114-5-76

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 248.

THE RICHMOND MINING COMPANY OF NEVADA, PLAINTIFF IN ERROR,

vs.

E. H. ROSE, J. W. HIXON, GEORGE W. MERRILL, AND SELDEN HETZELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

FILED AUGUST 2, 1882.

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1 In Supreme Court of the State of Nevada.

E. H. Rose *et al.*, Appellants,
vs.
Richmond Mining Company of Nevada, Respondent. } No. 1089.

Transcript on Appeal from the District Court, Sixth Judicial District, Eureka County, Nevada.

Baker & Wines, attorneys for appellants; Thomas Wren, attorney for respondent.

(Endorsed:) Supreme court Nevada. Filed Sep. 29, 1881. Chas. F. Bicknell, clerk.

2 & 3 In the Supreme Court of the State of Nevada.

Complaint.

In the District Court of the Sixth Judicial District in and for the County of Eureka, Nevada.

E. H. Rose, J. W. Hixon, Geo. W. Merrill, and Selden Hetzel, Plaintiffs,
vs.
Richmond Mining Company of Nevada, Defendant.

The plaintiffs in the above-entitled action complain of the defendant therein, and for cause of action allege—

First. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Ne-
4 vada, engaged in business at Eureka, Eureka county, Nevada.

Second. That the plaintiffs are, and ever since the 20th day of January, A. D. 1872, have been, the owners of, seized, and possessed of the following described premises, to wit: The Uncle Sam mining claim, ledge, lode, and deposit of mineral-bearing ore, rock, and earth, situate, lying, and being in the Eureka Mining District, county of Eureka, State of Nevada, on the northwesterly slope of "Ruby Hill," and more particularly described as follows: Commencing at a point whence the Uncle Sam shaft bears north 44 degrees west, and is distant (412⅓) four hundred and twelve and one-third feet, and running thence north 57 degrees west eight hundred feet; thence north 33 degrees east two hundred feet; thence south 57 degrees east eight hundred feet; thence south 33 degrees west two hundred feet to place of beginning; together with all the veins, lodes, and ledges throughout their entire depth the top or apex of which lies within said surface boundaries.

Second. That defendant unjustly and adversely to plaintiffs claims an estate in fee in and to said premises, and the right of possession thereof, and the right of extracting and converting to its own use all the mineral-bearing rock, ore, and earth therein contained, and has filed in the United States land office an ap-
5 plication for a patent thereto under the name of the St. George ledge and mine. Wherefore the plaintiffs pray judgment

that defendant and all persons claiming by, under, or through it be forever debarred from all claim to any estate or interest in said premises, or any part thereof, and to any right of possession thereof, or of any part thereof, and to the right of extracting ore therefrom; and for costs, and for such other and further relief as may be just and equitable.

GEO. W. MERRILL AND
SELDEN HETZEL,
Attorneys for Plaintiffs.

STATE OF NEVADA, }
County of Eureka, } ss:

Selden Hetzel, being duly sworn, says: He is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

SELDEN HETZEL.

Subscribed and sworn to before me, this 21st day of October, A. D. 1873.

[SEAL.] F. H. HARMON, *Clerk.*

(Endorsed:) No. 102. In district court, sixth judicial district, Eureka county. E. H. Rose *et al. vs.* Richmond Mining Company of Nevada. Complaint. Filed Oct. 21st, 1873. F. H. Harmon, clerk.

6

Demurrer.

In the District Court of the Sixth Judicial District of the State of Nevada, within and for Eureka County.

E. H. ROSE, J. W. HIXON, GEORGE W. MERRILL, and SELDEN HETZEL,
Plaintiffs,
vs.
RICHMOND MINING COMPANY OF NEVADA, Defendant.

And now comes the said defendant, and demurs to the complaint of plaintiffs on file in this action, and for cause of demurrer alleges:

That the complaint does not state facts sufficient to constitute a cause of action.

DARROW & BAILY,
Attorneys for Defendant.

(Endorsed:) Due service of the within hereby acknowledged this 1st day of November, 1873. Selden Hetzel and G. W. Merrill, attorneys for plaintiffs. Filed November 1st, 1873. F. H. Harmon, clerk.

Answer.

In the Sixth Judicial District Court, Eureka County, Nevada.

E. H. ROSE, J. W. HIXON, GEO. W. MERRILL, and SELDEN HETZEL,
Plaintiffs,
vs.
RICHMOND MINING COMPANY OF NEVADA, Defendant.

7 Now comes defendant by attorney, and for answer to plaintiff's complaint herein denies—

That the plaintiffs were ever the owners of or seizor or possessor of the premises described in plaintiffs complaint or any part thereof.

Defendant further denies that it claims an estate in fee or otherwise to said premises or any part thereof, except that portion included in the patent survey described in plaintiffs' complaint as the St. George, or that it claims the possession thereof or any portion thereof, except that portion included within said patent survey, or that it claims the right of extracting or converting to its own use all or any of the mineral-bearing earth, rock, or ore contained in said premises or any part thereof, except that part contained in said patent survey, or that it has applied for a patent to said premises or any part thereof, except that part contained in said patent survey.

Defendant further denies that said patent survey covers or includes all or any of said premises, except a small part thereof.

And for a further answer defendant alleges that it is the owner of, in the possession of, and entitled to the possession of, and that ever since the first day of January, 1873, it has been, and now is, the owner of the said St. George mining claim.

Wherefore plaintiffs ask to be hence dismissed with its costs of suit.

THO'S WREN,
Attorney for Plaintiff.

8 STATE OF NEVADA, }
County of Eureka, } *ss:*

J. B. McGee, being first duly sworn, says: That he is an officer of said defendant, to wit, one of the trustees of defendant and its managing agent; that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated, and as to those matters he believes it to be true.

JNO. B. McGEE.

Subscribed and sworn to before me, this 26th day of November, 1873.

F. H. HARMON, *Clerk.*
By SAM. BELL, *D. C.*

(Endorsed:) Service acknowledged Nov. 26th, 1873. G. W. Merrill, plaintiffs' attorney. Filed Nov. 26th, 1873. F. H. Harmon, clerk.

Amended Answer.

In the Sixth Judicial District Court in and for Eureka County, Nevada.

E. H. ROSE, J. W. HIXON, GEO. W. MERRILL, and SELDEN HETZEL, Plaintiffs,

vs.

THE RICHMOND MINING COMPANY OF NEVADA, Defendant.

9 Now comes said defendant, and, by leave of court first had, files this its amended and supplemental answer to the complaint of plaintiffs filed herein, and denies that the plaintiffs were ever the owners of, seized, or in possession of the premises described in plaintiffs' complaint or any part thereof.

And for further answer defendant alleges that at the time of the commencement of this action defendant was the owner of, in the possession of, and entitled to the possession of all said mining ground and premises described in plaintiffs' complaint and included in the patent application of the defendant for the St. George ledge, lode, deposit, or mining claim.

For further answer defendant alleges that since the commencement of said action defendant has acquired title by patents from the United States to all that portion of said mining ground in controversy included within the application for patent for the St. George ledge, lode, deposit, or mining claim, and thence hitherto has been, and still is the owner of, in the possession of, and entitled to the possession of said portion of said premises under said title by patents from the United States.

Wherefore defendant prays to be hence dismissed with its costs in this behalf expended.

WREN & CHEENY,
Attorneys for Defendant.

10 STATE OF NEVADA, }
County of Eureka, } *ss:*

Thomas Wren, being duly sworn, deposes and says: That he is an officer, to wit, the president of the defendant, the Richmond Mining Company of Nevada, and as such officer makes this affidavit on behalf of said company; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the statements therein made upon information or belief, and as to those statements he believes them to be true.

THOS. WREN.

Sworn to and subscribed before me, this 20th day of April, A. D. 1881.

[SEAL.] ED. VANDERLEITH, *Notary.*

(Endorsed:) Filed April 20th, 1881. C. J. R. Buttlar, clerk. By W. R. Forrest, D. C. Service admitted April 20th, 1881. Baker & Wines, attorneys for plaintiffs.

Judgment.

In the District Court of the Sixth Judicial District of the State of Nevada, in and for Eureka County.

E. H. ROSE, J. W. HIXON, GEO. W. MERRILL, and SELDEN HETZEL, Plaintiffs,

vs.

THE RICHMOND MINING COMPANY OF NEVADA, Defendant.

11 This action coming on for trial before the court, and the parties appearing by their attorneys, and having in open court waived a trial by jury, and the court having duly heard and considered the evidence, oral and documentary, offered by the respective parties, and having duly found and filed its findings of fact and conclusions of law thereon:

Now, therefore, it is ordered, considered, and adjudged that the claim of title and right of possession of the plaintiffs to that portion of the mining claim, lode, and premises in controversy, described in plaintiffs' complaint as the Uncle Sam, lying between the end lines of the Victoria patented claim of defendant, extended from the quartzite foot wall to the shale hanging wall, and lying southeasterly of the line "K L," drawn on the diagram, "Exhibit H," annexed to the findings herein, and the diagram marked Exhibit "A," annexed hereto, said line being a continuation of the northwest end line of the said Victoria claim from the quartzite foot wall to the shale hanging wall, is without right and wholly invalid and void, and that the claim of the defendant thereto and to the right of possession thereof is good and valid.

It is further ordered, considered, and adjudged that the plaintiffs' claim of title and right of possession to that portion of said mining claim and premises lying between the shale hanging wall and
12 the quartzite foot wall to the northwest of said line "K L" is good and valid.

It is further ordered, considered, and adjudged that the defendant is the owner, in the possession of, and entitled to the possession of all of said mining claim, lode, and premises first above described, lying between the end lines of the said Victoria mining claim, extended from the quartzite foot wall to the shale hanging wall. It is further ordered, considered, and adjudged that the plaintiffs are the owners of, in possession of, and entitled to the possession of all that portion of said mining claim and premises lying between the quartzite foot wall and the shale hanging wall to the northwest of said line "K L."

It is further ordered, considered, and adjudged that the injunction heretofore granted in this action restraining the defendant be vacated and dissolved, in so far as it relates to that part of the lode or premises easterly of said line "K L," and that said injunction, in so far as it relates to the premises northwest and westerly of said line "K L," be continued against defendant in full force perpetually.

It is further ordered, considered, and adjudged that the plaintiffs do have and recover of and from the defendant their costs, taxed at ($405.95) four hundred and five 95-100 dollars.

HENRY RIVES,
District Judge.

Judgment rendered Sept. 7th, A. D. 1881.

(Here follows diagram marked p. 12.)

13 (Endorsed:) Judgment roll. Filed Sept. 7th, 1881. Chas. J. R. Buttlar, clerk.

Notice of Appeal.

In the District Court of the Sixth Judicial District in and for Eureka County, State of Nevada.

E. H. ROSE and Others, Plaintiffs,
vs.
THE RICHMOND MINING COMPANY OF NEVADA, Defendant.

You will please take notice that the plaintiffs in the above-entitled cause hereby appeal to the supreme court of the State of Nevada from the judgment made and given in said cause on the 7th day of September, A. D. 1881, by the district court of the sixth judicial district in and for Eureka county, State of Nevada.

Dated at Eureka, September 27th, 1881.

BAKER & WINES,
Attorneys for Plaintiffs.

To the clerk of said district court, and Messrs. Wren & Cheney, attorneys for defendant.

(Endorsed:) Service of the within notice of appeal by copy after the filing thereof, this 27th day of September, 1881, is hereby admitted. Thos. Wren, attorney for defendant. Filed Sept. 27th, 1881. Chas. J. R. Buttlar, clerk.

14 *Undertaking on Appeal.*

In the District Court of the Sixth Judicial District in and for Eureka county, State of Nevada.

E. H. ROSE and Others, Appellants,
vs.
THE RICHMOND MINING COMPANY OF NEVADA, Respondent.

Whereas E. H. Rose and others, appellants in the above-entitled cause, have appealed to the supreme court of the State of Nevada from the judgment made and given in said cause by the district court of the sixth judicial district in and for Eureka county, State of Nevada, on September 7th, 1881:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, E. N. Robinson and C. L. Broy, both of Eureka county, State of Nevada, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said ap-

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pellants will pay all damages and costs which may be awarded against them on the appeal, not exceeding three hundred dollars, gold coin of the United States, to which amount we acknowledge ourselves jointly and severally bound.

Dated at Eureka, Sept. 27th, 1881.

C. L. BROY.
E. N. ROBINSON.

15 COUNTY OF EUREKA, *ss:*

C. L. Broy and E. N. Robinson, sureties upon the foregoing undertaking, being duly sworn, each for himself, says: That he is worth the amount specified in said undertaking, to wit, $300, over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. L. BROY.
E. N. ROBINSON.

Subscribed and sworn to before me, this 27th day of September, A. D. 1881.

[SEAL.] JAS. W. SMITH,
Notary Public, Eureka County, Nevada.

(Endorsed:) Filed Sept. 27th, 1881. Chas. J. R. Buttlar, clerk.

STATE OF NEVADA, *County of Eureka,* } *ss:*

I, Chas. J. R. Buttlar, county clerk and *ex-officio* clerk of the district court, sixth judicial district, in and for said county, do hereby certify that the above and foregoing are true and correct copies of the judgment roll in the case of E. H. Rose and others against the Richmond Mining Company of Nevada, heretofore pending in said court, and also of the notice of appeal and undertaking on appeal in said cause. All of which papers now remain on file in my office at Eureka, county and State aforesaid.

16 In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the town of Eureka, this 27th day of September, A. D. 1881.

[SEAL.] CHAS. J. R. BUTTLAR,
County Clerk.

Statement on Appeal.

STATE OF NEVADA, *County of Eureka:*

In the District Court, Sixth Judicial District.

E. H. ROSE, J. W HIXON, GEO. W. MERRILL, and SELDEN HETZEL, Plaintiffs,

vs.

THE RICHMOND MINING COMPANY OF NEVADA, Defendant.

Statement on appeal presented by the plaintiffs in the above-entitled action:

This is an action instituted to quiet the title and possession of plaintiffs in and to the Uncle Sam mine, mining claim, lode, and

premises, situated in Eureka Mining District, Eureka county, State of Nevada, and to determine an adverse claim thereto under a protest filed in the U. S. land office at Eureka, Nevada, against an application for patent for the St. George mining claim by the defendant herein. The complaint in such action was filed on the 21st day of October, 1873, and of which the following is a true copy, to wit:

17 In the District Court of the Sixth Judicial District, in and for the County of Eureka, Nevada.

E. H. ROSE, J. W. HIXON, GEORGE W. MERRILL, and SELDEN HETZEL, Plaintiffs,

vs.

RICHMOND MINING COMPANY OF NEVADA, Defendant.

The plaintiffs in the above-entitled action complain of the defendant therein, and for cause of action allege:

First. That the defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of Nevada, engaged in business at Eureka, Eureka county, Nevada.

Second. That the plaintiffs are and ever since the 20th day of January, A. D, 1872, have been the owners of, seized and possessed of, the following described premises, to wit: The Uncle Sam mining claim, ledge, lode, and deposit of mineral-bearing ore, rock, and earth, situate and lying and being in the Eureka Mining District, county of Eureka, State of Nevada, on the northwesterly slope of Ruby Hill, and more particularly described as follows: Commencing at a point whence the Uncle Sam shaft bears north 44 degrees west and is distant ($412\frac{1}{3}$) four hundred and twelve and one-third feet,

18 and running thence north 57 degrees west eight hundred feet; thence north 33 degrees east two hundred feet; thence south 57 degrees east eight hundred feet; thence south 33 degrees west two hundred feet to the place of beginning; together with all the veins, lodes, and ledges throughout their entire depth, the top or apex of which lies within said surface boundaries.

Second. That defendant, unjustly and adversely to plaintiffs, claims an estate in fee in and to said premises and the right of possession thereof, and the right of extracting and converting to its own use all the mineral-bearing rock, ore, and earth therein contained, and has filed in the United States Land Office an application for a patent thereto, under the name of the St. George ledge mine.

Wherefore the plaintiffs pray judgment that defendant and all persons claiming by, under, or through it be forever debarred from all claim to any estate or interest in said premises or any part thereof, and to any right of possession thereof, or any part thereof, and to the right of extracting ore therefrom, and for costs and for such other and further relief as may be just and equitable.

GEO. W. MERRILL AND
SELDEN HETZEL,
Attorneys for Plaintiffs.

STATE OF NEVADA, } ss:
County of Eureka, }

Selden Hetzel, being duly sworn, says: He is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his knowledge, except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

SELDEN HETZEL.

Subscribed and sworn to before me, this 21st day of October, A. D. 1873.

J. C. HARMON, *Clerk.*

(Endorsed:) Filed October 21st, 1873. F. H. Harmon, clerk.

That thereafter, to wit, on the 26th day of November, 1873, the defendant filed its answer in such action, of which the following is a true copy, to wit:

(Title of Court and Cause.)

Now comes defendant, by attorney, and for answer to plaintiffs' complaint herein denies—

That the plaintiffs were ever the owners of or seizer or possessor of the premises described in plaintiffs' complaint, or any part hereof.

Defendant further denies that it claims an estate in fee or otherwise to said premises, or any part thereof, except that portion included in the patent survey described in plaintiffs' complaint as the St. George, or that it claims the possession thereof, or of any portion thereof, except that portion included within said patent survey, or that it claims the right of extracting or converting to its own use all or any of the mineral-bearing earth, rock, or ore contained in said premises or any part thereof, except that part contained in said patent survey, or that it has applied for a patent to said premises or any part thereof, except that part contained in said patent survey.

Defendant further denies that said patent survey covers or includes all or any of said premises, except a small part thereof. And for a further answer defendant alleges that it is the owner of, in the possession of, and entitled to the possession of, and that ever since the first day of January, 1873, it has been and now is the owner of the St. George mining claim.

Wherefore plaintiff asks to be hence dismissed with its cost of suit.

THOS. WREN,
Attorney for Plaintiffs.

STATE OF NEVADA, } ss:
County of Eureka. }

J. B. McGee, being first duly sworn, says: That he is an officer of

said defendant, to wit, one of the trustees of defendant, and its managing agent; that he has heard the foregoing answer read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated, and as to these matters he believes it to be true.

JNO. B. McGEE.

21 Subscribed and sworn to before me, this 26th day of November, 1873.

F. H. HARMON, *Clerk.*
By SAM'L BELL, *D. C.*

(Endorsed:) Service acknowledged Nov. 26th, 1873. G. W. Merrill, plaintiffs' attorney. Filed Nov. 26th, 1873. F. H. Harmon, clerk.

That thereafter, to wit, on the 20th day of April, 1881, defendant filed its amended and supplemental answer, of which the following is a true copy, to wit:

(Title of Court and Cause.)

Now comes said defendant, and by leave of court first had, files this its amended and supplemental answer to the complaint of plaintiffs filed herein, and denies that the plaintiffs were ever the owners of, seized or in possession of, the premises described in plaintiffs' complaint, or any part thereof.

And for further answer defendant alleges that at the time of the commencement of this action defendant was the owner of, in the possession of, and entitled to the possession of all said mining ground and premises described in plaintiffs' complaint, and included in the patent application of the defendant for the St. George ledge, lode, deposit, or mining claim. For further answer defendant alleges that since the commencement of said action defendant has acquired title by patent from the United States to all that portion of
22 said mining ground in controversy included within the application for patent for the said St. George ledge, lode, deposit, or mining claim, and thence hitherto has been and still is the owner of, in the possession of, and entitled to the possession of said portion of said premises under said title by patents from the United States.

Wherefore defendant prays to be hence dismissed with its costs in this behalf expended.

WREN & CHENEY,
Attorneys for Defendant.

STATE OF NEVADA, }
County of Eureka, } ss:

Thomas Wren, being duly sworn, deposes and says; That he is an officer, to wit, the president of defendant, the Richmond Mining Company of Nevada, and as such officer making this affidavit on behalf of said company; that he has read the foregoing answer and knows

the contents thereof, and that the same is true of his own knowledge, except as to the statements therein made upon information or belief, and as to those statements he believes them to be true.

THOS. WREN.

Sworn to and subscribed before me, this 20th day of April, A. D. 1881.

E. D. VANDERLIETH,
Notary Public.

(Endorsed:) Filed April 20th, 1881. C. J. R. Buttlar, clerk.
23 By W. R. Forrest, D. C. Service admitted April 20th, 1881. Baker & Wines, attorneys for plaintiffs.

That thereafter, to wit, on the 13th day of July, 1881, this cause came regularly for trial upon the pleadings and evidence.

The parties appearing by their respective counsel, and a jury having been by them expressly waived, this cause was tried before the court.

The court, after hearing all the evidence introduced by the respective parties and the argument of counsel, and having fully considered the evidence and the law, did thereafter, to wit, on the 27th day of July, 1881, deliver and cause to be filed its opinion, of which the following is a true copy, to wit:

Opinion and Order upon Trial.

(Title of Cause and Court.)

This action was commenced upon the 21st day of October, A. D. 1873. The defendant filed its answer November 26th of the same year, and upon April 20th, 1881, filed its amended answer.

Upon the complaint filed at the time of the commencement of the action and the amended answer the application for injunction was heard and this trial had.

The Albion Con. M. Co., having filed a petition of intervention on April 23d, 1881, in which it claimed a right to intervene by
24 reason of the facts in the petition set up, viz., that since the commencement of this action it had purchased all the right and title of these plaintiffs, and therefore succeeded to their interests, and that these plaintiffs had now no right or interest in this action.

The defendant moved to strike out the petition, which motion was granted, with leave to the Albion company to be substituted, as it had shown no ground to intervene, but was entitled to the option of permitting the action to proceed in the name of the original plaintiffs or to be substituted. It chose to conduct the action in the name of the original parties.

The complaint set forth—

First. That the defendant is a corporation.

Second. That plaintiffs are, and ever since January 20th, 1872, have been, the owners of, seized and possessed of, * * * the Uncle Sam mining claim, ledge, lode, and deposit of mineral-bearing rock, ore, and earth.

Third. That defendant, unjustly and adversely to plaintiffs, claims an estate in fee and to said premises.

Fourth. That the defendant has filed in the U. S. Land Office an application for a patent thereto, under the name of the St. George ledge and mine.

The answer admits the corporation, and that the *application alleged* had been made in the Land Office. It denies that the plaintiffs
25 were ever the owners of, seized, or in possession of the premises or any part thereof. It alleges that defendant is the owner, in possession, and entitled to the possession of said premises; that since the commencement of this action it has acquired title by patents from the Government of the United States to all that portion of said mining ground in controversy, and claims ownership, possession, and right of possession under said patents. It was established by the evidence on behalf of plaintiffs on this trial that the Uncle Sam was located January 14th, 1872, by Rose and two associates; the claim was made for 800 feet on the ledge by 200 feet wide; the act of Congress of 1866 (under which Rose located) "gave to each locator 200 feet on the vein and an additional 200 feet for discovery." Rose and his associates did the required amount of work upon this claim so long as they owned it, and since their title has been owned by the Abion Co. it has expended upon the claim several hundred dollars each year in excess of the amount required by law up to date. And so far as *work, occupation,* and the *marking of boundaries* is concerned, plaintiffs have performed all of *these things* required by the act of Congress of May 10th, 1872, relative to mining claims. It was admitted through the trial that the Uncle Sam and all other locations owned by either party and which
26 were put in controversy in this proceeding were a part of and upon the same great vein and lode. The Richmond company therefore claimed that as it had not only been discovered, but that many prior locations had been made upon this great lode prior to the location of the Uncle Sam, that Rose had no right to take a discovery claim, and further in support of its position on this point established that Phillips and Haskell had located the identical ground now known as the Uncle Sam in 1871, and had done considerable work thereon at or soon after their location.

Phillips, who personally located it in 1871, testified that Rose first pointed out the ground to him, and that he (Phillips) made his location at a small hole where Rose had done work and exposed some galena ore. Phillips and Haskell, however, evidently abandoned their claim to this ground before Rose located the Uncle Sam.

They having abandoned it, it became public domain again as fully as though they had never appropriated it, save, possibly, that an entire stranger might not be permitted to take a bonus of 200 feet as a "discovery claim." But the case is different with Rose, for when he located it it had again become public domain, and he having originally exposed the ledge at that point, and believing, as he testified he did, and doubtless as every miner in the district then did believe, that it had no part or parcel with any other ledge,
27 why should he not locate and claim his discovery? Certainly there was no bad faith indicated under the circum-

stances in his doing so. Much evil would ensue were the court to decide that locations wherein a discovery claim had been taken under the circumstances of this case were absolutely void. I think the rule in such instances should be that the claim is only bad *pro tanto*, and so long as the mistaken locator remained in possession no one could legally enter his ground to locate his excess. It therefore follows from these views that the Uncle Sam location was not void for the mistake of Rose in taking 200 feet for discovery.

Having established the foregoing facts concerning the Uncle Sam, the plaintiffs rested their case, when the defendant, to maintain the issues on its part, offered in evidence U. S. patents to the Tip Top, St. George, and Victoria claims.

To the admission of the "Victoria," and especially to the St. George patent, the plaintiffs objected, on the ground that the "St. George" patent was void for having been issued without authority of law while a contest was pending in the U. S. Land Office concerning the ground embraced therein, and to the Victoria because it had been acquired since the commencement of this action.

The objection to the St. George was overruled and the pat-
28 ent admitted as evidence, because, so far as the evidence up to that point showed, there was nothing before the court establishing that any valid protest had been made to the issuance of the patent; and the "Victoria" patent was also admitted and plaintiffs' objection overruled, because any defendant has a perfect right to acquire as many new titles as he can after a suit is commenced against him and to put them all in evidence, and for the further reason that it is not claimed that any protest was ever made against the issuance of the "Victoria."

Plaintiffs excepted to these rulings. Defendant then introduced in evidence the notices of location of the "Tip Top" and "Victoria" claims, and after establishing the correctness of certain of the maps showing the relative positions of all of the claims mentioned in the case, put in some testimony tending to prove that Rose had only claimed the "Uncle Sam" as being 106 feet wide at one end, instead of 200, and then rested its case.

In regard to this latter point of his having only claimed the Uncle Sam as being 106 feet wide, it is unnecessary to give an opinion, because it was frankly admitted by all of the counsel that any valid title on the great lode carried all of it below the surface and between the end lines.

At this juncture the plaintiffs offered in evidence a properly au-
thenticated copy of the proceedings in the U. S. Land Depart-
29 ment by means of which the Richmond Co. obtained a patent to the St. George. Counsel for the Richmond Co. vigorously opposed, and counsel for Rose ably advocated its admission.

The objections of the Richmond Co. were overruled and the testimony admitted, counsel for the Richmond excepting.

Rose then testified that he had never abandoned or intended to waive his adverse claim and protest against the St. George; that he had delayed vigorous proceedings because he had hopes of adjusting the controversy in some way with the Richmond Co., and gave

good reasons for his hopes. Other testimony than that of Rose on this point was also introduced.

Plaintiff also introduced testimony tending to show that the northeast corner stake of the Tip Top had once stood some 12 feet further east than where it now stands, and had remained in that position several years.

This embraced all the testimony of plaintiff in rebuttal which it is necessary to notice in order to fully determine this case.

The defendant then introduced some testimony tending to establish that Rose had actually intended to and did waive his protest and adverse claim. A good deal of testimony other than I have noticed was offered and admitted in evidence, but which bears too remotely upon the issue in this cause to merit reference.

30 From the testimony above referred to and other that was received in evidence I find as facts:

Those which were hereinbefore mentioned in regard to the Uncle Sam claim respecting the manner of its location, possession, within established boundaries, and as to necessary work to date.

That the Richmond Co. obtained from the Government a patent to the "Tip Top" location on the 30th day of April, 1874 that this patent is admitted to be in all respects regular and valid; that a surveyor of the Richmond Co.'s in May, 1877, placed the northeast corner stake of said patented claim some ten or twelve feet further south and east than where the same is now admitted to stand; that such stake remained in that position until in the year 1879, when it was removed to its present position.

There was no testimony as to where this stake stood in 1874, when the patent was issued, nor as to where it was placed by the mineral surveyor who made the original survey prior to application for the patent, and it is not denied but that the stake is now some ten or eleven feet further south and east than the calls in the patent would require it to be.

Whether that stake was placed at the place at which it was seen in 1877 through mistake of the surveyor or otherwise does not appear, and because it stood beside a peculiar square rock

31 (which latter is a permanent object,) but which is not mentioned in the calls of the patent, can make no difference; unless the positions of the stakes prior to or immediately after issuance of a patent can be indubitably established, it would be too hazardous for courts to permit such positions to control the courses and calls in a Government patent after three years had elapsed since its issue, because a patentee might be interested in moving them in a certain direction, for interested parties opposed to a patentee might have similar inducements to move them in an opposite direction, where they might remain for years, and in case of the patentee's absence or without his knowledge, he being in the vicinity, it would result in some instances in great loss or hardship. Even were such stakes improperly placed with a patentee's knowledge and through his own or his agent's mistake, it would be wrong in a court to say, "You cannot be relieved from the effects of your mistake." It would be otherwise did the calls in the patent

refer to what the authorities denominate "permanent objects," or even to stakes proven to have been placed at or about the time of application for or issuance of patent. Did the calls in the "Tip Top" patent refer to that peculiar square rock, it would undoubtedly control that corner, but not so under the testimony in and
32 circumstances of this case; and I shall therefore hold that the Richmond Co. is bound only by the present position of that stake, which I conclude to be point C in the line running "from A to C," as shown on plaintiffs' Exhibit III.

The determination of this fact, however, is not necessary to the decision in this case, as will appear subsequently herein, and I only determine it in order that the case may be fairly presented on appeal in case it should be concluded by the supreme court that I am wrong as to the grounds upon which I finally decide.

I find from the exemplified copy of the proceedings connected with the application of the Richmond Co. for a patent to the St. George, that the application was made in the proper land office August 1st, 1873; that in due time plaintiffs protested and filed an adverse claim against said application; that they brought suit in the proper court within the required time, and have prosecuted said action with due diligence under the circumstances proven on the trial.

On the trial the Richmond Co. strenuously contended that because Rose or some others of the adverse claimants had not paid the five dollars required by law as a docket tax that no action had been commenced in the thirty days required by the law of Congress of 1872, and that up to date no action could be deemed as having been commenced.
33 The statutes of this State provide that unless such fee be paid no action shall be deemed to have been commenced, and if defendant's position on this point is correct it should have made affirmative proof in the land office of such fact before demanding its patent, and in this action it can only make such a plea available by pleading the same in abatement.

No proof was made in the land office that no action had been commenced, and in the absence of such affirmative proof and notice of the same, and the register's decision thereon, I think he, the register, had no jurisdiction to proceed in the matter or to issue a patent. In short, I am clearly of opinion that the "St. George" patent was issued without authority of law, while the land embraced in the application was reserved from sale as effectually as though there had been a special act of Congress excluding it, and that therefore it is also absolutely void.

In this connection it is but due to counsel to notice some positions taken in the closing argument, wherein it was contended that the "St. George" patent was void because it was issued pending a protest against its issuance and while the action remained undetermined in this court; that all acts of the officers of the Land Department after the filing of the protest were without authority and void. In these views I have already concurred. While contending
34 that the patent was void and the acts of the land officers equally so, the eminent counsel claimed that it only lies in

the mouth of the plaintiffs in this case to demand a judgment so declaring it. In this I cannot agree, for the reason that it is equally the promise of the Government to have it so declared and perhaps of any citizen in an action *ex rel.* The same counsel further demanded that this court in this character of action should decree the defendant to be the trustee of plaintiffs, holding the "St. George" title or a portion thereof for the benefit of plaintiffs. In the first place, no such trust could be declared in this character of action, because no facts justifying it have been pleaded by Rose or proven under his "implied replication;" and, in the second place, no trust can be declared or adjudged in a title that is absolutely void. Were a direct action to be brought for this purpose, and it should be shown as in this case that the patent was void either by the pleadings or proof, there is no court but would be compelled to dismiss the suit. What would it benefit a man to have a decree rendered to the effect that another held a void title in trust for him? Or a judgment that the defendant convey such void title? The same counsel, referring to the "St. George" and "Victoria" locations, claimed that there was no proof that the Richmond Co. had ever stuck a stake or in any proper or legal manner made a valid
35 location of either of these claims. While this is true as a matter of record in this case, and while it is also true that the notices of location of each of these claims is junior to that of the Uncle Sam, I am at a loss to see any force in such a position, in view of the well-established doctrine of all of the courts that a patent is *prima facia* evidence that all steps necessary to a valid and incontrovertible title have been taken by the patentee. The Supreme Court of the U. S. and every State court where this question has ever been presented have held to this rule without a single exception, and they have all held that the only two instances in which facts showing that all preliminary steps had not been taken regularly is in the case where a plaintiff properly pleads and sets them forth in his complaint in an action different from this, and where a defendant shall have pleaded them in *defense* of an action against him brought by a patentee wherein the patent is declared on.

In support of this latter position I have only to refer to the decision of the eminent jurist who heard and determined the applications for injunctions in the three Richmond Albion cases, wherein he says:

"The action of the Richmond Co. *vs.* The Albion Con. Co. is ejectment relying upon the "*St. George*" *patent* as title to the Albion Company fully *answered*, setting up all the claimed equi-
36 ties and asking that the Richmond Co. may be decreed to hold the "St. George" patent in trust. Under the code in this State law and equity are blended, and a *defendant* may avail himself *by answer* of as many defenses as exist."

Further referring to that case in which the Richmond Co., and not Rose or the Albion, is *plaintiff*, but in which they are *defendants*, he says: "The Richmond Co. is seeking to recover this property from the Albion by force of this patent. *It* is muniment of title,

and I can discern no sufficient reason upon principle or authority for denying the defendant this right."

It will be observed from this reading that the Hon. Judge Rising treated the Albion Co. as the *defendants* throughout the hearing upon the three applications for injunctions, and overlooked the fact that in this case Rose in the stead of the Albion Co. was a *plaintiff*, and plaintiff in a statutory proceeding to quiet title in which no equities on his part had been alleged; and it is a fundamental principle that while a plaintiff may rebut a defendant's case by any *testimony* which would avoid the effect of defendant's case, still that no court, whether of law or equity, can go beyond the consideration of the facts alleged, or necessarily implied therefrom, in determining the character of relief to be rendered in the action. For a court to do more would be tantamount to permitting a plaintiff to
37 come into court upon and set up one cause of action and obtain relief upon an entirely different one. Any judgment of such a character would be set aside by any appellate court upon the judgment roll alone. Were the "St. George" not void, no trust in favor of the plaintiffs herein could be decreed, because under their complaint no facts entitling them to such relief are alleged. The error into which Judge Rising inadvertently fell when he treated and called the Albion (and Rose stands here as the Albion Co.) the "defendant," arose from the fact that the only case in which any testimony was offered before him was that of the Richmond Co., plaintiff, *vs.* The Albion Con. Co., defendant. And the testimony given therein was stipulated to have been given in the second case of the same title and in this one wherein Rose is *plaintiff*. In the five cases wherein the Albion Co are defendants I presume that the equities in favor of the company have been fully pleaded, as a *defendant* is entitled to plead them, and that when it comes to the trial of those cases in the near future the jurisdiction of the court will be ample to render such decree as the facts set up in the pleadings may justify. I do not desire, however, in passing upon *this* case to be understood as even intimating that in those cases either party will "so assuredly be entitled to" any special character of "relief,"
38 nor can I dare to "express my convictions as to what must be the evident result upon the merits. There remains but one question which I deem it necessary to pass upon, and that is in respect to the validity of the Victoria patent.

It appears from the notice of location that the "Victoria" was taken up or located about December 7th, 1872, and a patent therefor was issued February 28th, 1880.

The Uncle Sam claim covers, so far as the maps show and so far as Rose staked out his surface boundaries, but a small portion of the surface of the Victoria, but, however small, sufficient to entitle these plaintiffs to have protested against its issuance; to have commenced an action similar to this, and to have thus secured a stay of proceedings such as should have been had in the matter against the St. George, and in consequence of which stay not having been had has invalidated that patent. We find, however, that no protest or adverse claim was ever made against the issuance of the "Victoria"

patent; we find it admitted that it covers a portion of this great lode immediately to the east or northeast of the Uncle Sam.

It is also admitted that any valid patent on the lode carries the entire lode from wall to wall between the end lines of such a patent.

The "Uncle Sam" was located under the mining law of
39 1866, which gave to each locator 200 feet in length along the ledge, besides 200 feet additional for discovery. The mining laws of this district then in force and respected among the miners gave the same number of feet "on the ledge," besides 100 feet on each side thereof, for mining purposes.

Under these laws, then, it is pertinent to inquire what was the extent of Rose's location.

It will undoubtedly be admitted by any lawyer that the effect of his location, in the absence of a superior title or the waiver or forfeiture of his own, was to entitle him to 800 feet in length of this great lode from quartzite to shale and to "hold 100 feet on each side * * * for mining and building purposes."

Rose's notice of location also claims "eight hundred (800) feet on this ledge, lode, or mineral deposit," without any reference to the width or even the "100 feet on each side," and he very properly concluded at the time that he was entitled to the full width of the ledge and 100 feet on each side by virtue and operation of the laws of the district and those of Congress then in force. Under this state of facts his claim covered all of the "Victoria," with the entire lode between his end lines, and he was not only entitled to protest against the issue of that patent, but was *obliged* to do so or his rights
to all of the lode embraced within the "Victoria" would be
40 waived and forever forfeited. This identical point is expressly decided in the case of the Eureka Con. Co. *vs.* The Richmond M. Co., where Judge Field uses this language: "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original locator. If the date of such location be stated in the instrument or appear from the record of its entry in the local land office, the *patent* will take effect as of *that* date, so far as may be necessary to cut off all intervening claimants, *unless* the prior right, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872."

In the same case it is also decided that "where two parties are contending for the same property, the first in time in the commencement of proceedings for the acquisition of the title when the same are regularly followed up is deemed to be the first in right." In concluding the decision as to this subject the court said: "While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, * * * the doctrine can not be applied so as to cut off the rights of the *earlier patentee under a later location* where no opposition to that location was made under the statutes. *The silence of the first locator is under the statute a waiver of his priority.*

41 That case was affirmed by the Supreme Court of the United States in all respects, and, therefore, the incontrovertible law. The Richmond Co. is under the "Victoria," the "earlier patentee" "under a later location." Rose was the "first locator," but under the statute he has been guilty of a "waiver of his priority," by not protesting against the issuance of the "Victoria" patent.

It follows, therefore, that the defendant is entitled to all of that portion of the lode embraced within the end lines of the "Victoria." This includes about two-thirds of the "Uncle Sam" location, and all of the ore besides, so far as I am aware, concerning which an injunction was issued in this case against the Richmond Co. This injunction must, therefore, be dissolved, and judgment will be entered as indicated, with costs.

The counsel will prepare findings and conclusions, in accordance with this opinion, by the first day of the next term, to which time the entries of judgment is hereby deferred.

HENRY RIVES,
District Judge.

Eureka, Nevada, July 27th, 1881.

(Endorsed:) Filed July 27th, 1881.

That thereafter, to wit, upon the sixth day of September, 1881, the court, having fully considered the evidence adduced upon the trial of this cause, found and caused to be filed its findings
42 of fact, together with its conclusions of law, of which the following is a copy, to wit:

(Title of Court and Cause.)

First. That the Richmond Mining Company of Nevada is a corporation, duly formed and existing under and by virtue of the laws of the State of Nevada.

Second. That the mining ground in controversy is situated on Ruby Hill, in the Eureka Mining District, Eureka county, and State of Nevada; that along and through the hill for a distance slightly exceeding a mile, and extending in a northwesterly and southeasterly direction, is a zone of limestone, in which at different places throughout its length mineral is found. Underlying this zone on the southerly side is a well-defined unbroken foot-wall of quartzite, which foot-wall has a general dip to the northeast. On the northerly side of this zone of limestone is a hanging wall of shale. This zone of limestone is a vein or lode of rock in place, bearing gold, silver, lead, and other valuable minerals.

Third. That on the 19th day of September, A. D. 1864, the miners of the said Eureka District adopted certain rules and regulations for the district, a copy of which is hereunto annexed, marked Exhibit "A," and made a part hereof, and the same have ever since been in force and effect in said district.

43 Fourth. That on the 27th day of February, 1869, the miners of said district added new rules and regulations to those previously passed, a copy of which is hereunto annexed, marked Ex-

hibit "B," and made a part hereof, and the same have ever since been in force and effect in said district.

Fifth. That the Uncle Sam mining claim was located upon this zone of limestone on the 14th day of January, A. D. 1872, by E. H. Rose, J. W. Hixon, and Louis Milton, and there was included in said location eight hundred linear feet of said zone, 200 linear feet having been located for a discovery claim. That they recorded the notice of location in due time and marked the boundaries of the claim before the St. George was located.

Sixth. That several years prior to the location of the said Uncle Sam mining claim said zone had been discovered and a large number of mining claims located upon it, and at the time the Uncle Sam was located, Rose, one of the locators, knew of the existence of said locations, and that work was being prosecuted thereon. But at the time of the location of the Uncle Sam, and for a long time prior and subsequent thereto, it had been the custom and usage of the larger portion of the miners in Eureka Mining District, and upon this lode or zone, to include in their location 200 feet for a discovery claim, and is was not known or believed at the time of the
44 location of the Uncle Sam that the belt or zone of limestone running through Ruby Hill constituted one lode or zone, and at the time of the location of the Uncle Sam the locators thereof believed there was no other valid existing location upon the ground included in the surface boundaries of the Uncle Sam location, and that Rose and his associates made the Uncle Sam location in good faith and in accordance with the customs and usages of the majority of the miners in said mining district, and they and their grantees have ever since remained in the actual possession of said Uncle Sam location as located, to the extent of annually sinking a shaft thereon, maintaining and at times occupying a cabin thereon, and since the month of ——, 188–, excavating drifts and tunnels thereon, and that four hundred and sixty-six dollars' ($466) worth of work had been done on the Uncle Sam, including a cabin built to live in, costing one hundred and thirty-six dollars ($136), up to January 1st, 1877.

Seventh. That the said Uncle Sam mining claim adjoins one of the mining claims that had been located on said zone before the Uncle Sam was located, viz., the Tip Top, and that said Rose knew of said Tip Top location, and that work was being prosecuted thereon when he and his co-locators located the Uncle Sam mining
45 claim. But Rose and his associates did not know at the time of the location of the Uncle Sam that the Tip Top location and the Uncle Sam location were upon one and the same lode or zone; that between the Uncle Sam location and the Tip Top location there was no surface conflict.

Eighth. That a mining claim called the Phillips was located upon said zone on the 23d day of September, 1871, by —— Phillips. Phillips and Haskell, and the locators of the Phillips, within sixty days after its location, did work enough upon the claim to hold it under the mining laws of the said Eureka District for one year after

said claim was located; that said Phillips' claim was subsequently abandoned and prior to the location of the Uncle Sam.

Ninth. That prior to the location of the Phillips Rose had discovered some ore at the point where the notice of location of the Phillips was posted and had done work at that point.

Tenth. That at the time Rose and his co-locators located the Uncle Sam, Rose knew that Phillips had previously located the same ground identically as the Phillips and had done work upon it.

Eleventh. That Rose and his co-locators did the amount of work required to hold said Uncle Sam mining claim under the laws of the United States, and their successors in interest continued to
46 do the necessary work to hold said claims after succeeding to the interests of Rose and his co-locators up to the time of this trial, but none of said work was done upon that portion of the Uncle Sam claim embraced within the surface limits of the St. George patent, but such work was done inside of the Uncle Sam location as located.

Twelfth. That the Uncle Sam location was made upon the same ground identically covered by the Phillips claim.

Thirteenth. That the defendant, on the 1st day of August, 1873, made an application through the local United States land office at Eureka, Nevada, for a patent to the St. George mining claim, and the St. George claim was located on the 20th day of March, 1873, subsequent to the location of the Uncle Sam.

Fourteenth. That on the 29th day of September, 1873, and within the period allowed by law for publication of notice, E. H. Rose and J. W. Hixon filed a protest in said land office, which showed the boundaries and extent of plaintiffs' claim against said application, a copy of which is hereunto annexed, marked "C," and made a part hereof.

Fifteenth. That on the 21st day of October, 1873, said E. H. Rose, J. W. Hixon, G. W. Merrill, and Seldon Hetzel filed the original complaint in this action in the office of the clerk of this court,
47 but at the time of said filing did not pay the docket fee nor any other fees, and no fees were paid by them to said clerk until August, 1874. That the said clerk of said court on the 3d day of November paid said docket fee to the county treasurer of Eureka county; that no fees were afterwards paid by said Rose, Hixon, Merrill, or Hetzel in said cause, and none were paid by any of their successors in interest to said Uncle Sam mining claim until the 12th day of April, 1881. But the defendant in such action, the Richmond Mining Company of Nevada, filed a demurrer in said action, and also subsequently filed an answer therein, and did not at any time move to dismiss said action or file a plea in abatement therein for any reason whatever, and at the time of the issuance of the St. George patent the fact that the docket fee was not paid by the plaintiffs on the day the action was commenced was not called to the attention of the land department, and such patent was not issued upon the ground that no suit had been commenced or that such docket fee had not been paid; that no notice was filed in the land office at Eureka, Nevada, that no suit had been commenced. It was also the custom with the clerk of the court in which such action was brought,

when the docket fee was not paid on the day the suit was commenced, to advance the same and pay it into the county treas-
48 ury at the regular time for making such payments, upon the first of the month following, and the docket fee in this case was advanced and paid by the clerk of the court in which this action was pending at the regular time for making such payments.

Sixteenth. That the map hereto annexed, marked Exhibit "D," and made a part hereof, is correct, and correctly shows what it purports to show, more particularly the relative positions of the Tip Top, Uncle Sam, St. George, and Victoria mining claims and the quartzite and shale walls of the lode as they appear upon the surface on Ruby Hill, and that said Uncle Sam location covers so much of the lode and of the St. George and Victoria locations as is shown by said map.

(Here follows diagram, marked p. 48.)

Seventeenth. That on the 30th day of April, 1874, the Government of the United States issued a patent to the Tip Top lode, and the copy of said patent hereto annexed and made a part hereof, marked Exhibit "E," is a correct copy of said patent; that the relative positions of the Uncle Sam claim, the Victoria claim, the St. George claim, and the Tip Top claim are shown on a diagram hereto attached, marked Exhibit "H," and made a part of this finding; that the line "A C" on said diagram is the northerly end line of the Tip Top claim as established at the time the application for patent was made, and which has been marked by prominent monu-
49 ments from that time until the present; that the Tip Top claim, the Uncle Sam claim, the St. George claim, and the Victoria claim hereinabove mentioned are all on the same vein or lode; that a line drawn through the northwest end of the Victoria claim and extending from the quartzite foot wall to the shale hanging wall will be the dividing line between plaintiffs and defendants in this action; that said line is drawn on said Exhibit "H," and designated as line "K L."

(Here follows diagram, marked p. 49.)

Eighteenth. That on the 7th day of May, 1877, the Government of the United States issued a patent to the St. George lode and mining claim to defendant, and that the said copy of said patent hereto annexed, marked Exhibit "F," and made a part hereof, is a correct copy of said patent.

Nineteenth. That after the issuance of the patent to the Richmond Mining Company of Nevada of the St. George claim as before stated, said Richmond Mining Company of Nevada, on the 18th day of October, 1878, made an application for a patent to the United States for a mining claim known as the Victoria claim, which claim had been located subsequent to the location of the Uncle Sam claim, and procured a patent from the United States therefor on February 28th, 1880, and that no protest was filed against said application by the plaintiffs in this action. A correct copy of said "Victoria"
50 patent is hereto annexed and made a part hereof, marked Exhibit "G."

Twentieth. That theretofore, to wit, on the 2d day of March, 1872, said Louis Milton had conveyed unto the said E. H. Rose his interest, by him in said conveyance stated to be the quantity of $266\frac{2}{3}$ feet, to the said E. H. Rose; and that thereafter, to wit, on the 20th day of October, A. D. 1873, the said E. H. Rose and J. W. Hixon granted, sold, and conveyed to Geo. W. Merrill and Selden Hetzel, their co-plaintiffs herein, 200 feet, undivided, in the said Uncle Sam claim and premises.

Twenty-first. That the defendant herein, the Richmond Mining Company of Nevada, appeared in this action and filed the answer which is of record as the answer herein, on the 26th day of November, A. D. 1873.

Twenty-second. That thereafter the said cause being at issue as aforesaid, was placed upon the calendar of causes at issue for hearing and trial, according to the law and practice of this court; but that the same was not tried nor any matters or things therein done or performed, except as hereinafter expressly stated, for the reason that negotiations looking for a settlement of the matters in controversy between Rose and his associates and the Richmond Mining Company of Nevada, through its officers and agents, were
51 pending, and the plaintiffs were acting upon the belief that all matters referred in said action would be amicably settled between them and defendant without further cost; and that when such action was continued and allowed to remain untried, it was upon the belief on the part of plaintiffs that the defendant in such action would abandon all claim to that portion of the Uncle Sam location west of the west end line of the Tip Top claim in its application for patent, or that defendant would purchase said Uncle Sam location. It was owing to these facts that the prosecution of the suit was delayed.

Twenty-third. That at the March term, 1874, of this court the said cause was continued by request, at the motion of Thomas Wren, Esq're, of counsel for the defendant herein.

Twenty-fourth. That thereafter, to wit, the said cause was not placed upon the calendar, nor was any proceeding of any kind, sort, or character had or done therein until the March term of the year 1880, as will hereinafter be more fully mentioned, for reasons stated in finding 22.

Twenty-fifth. That in the month of September, 1876, the above-named defendant, the Richmond Mining Company of Nevada, made application to Daniel B. Immel, register, and Jefferson J. Works, receiver of the United States land office at Eureka aforesaid, to accept payment for the said St. George lode and for leave to
52 make final entry thereupon, and at the same time and place the said defendant tendered and offered to the said Daniel B. Immel and Jefferson J. Works, as register and receiver aforesaid, a certificate of F. H. Harmon, who was then and there clerk of this court, to the effect that this action had not been placed upon the calendar, nor had any proceedings been had therein from the March term, 1874, to the date of the said certificate. That the said certificate was and is true in the letter and substance thereof. That

thereafter the said Immel and Works, as register and receiver aforesaid, did rule and decide that the said plaintiffs herein had not prosecuted this action with due diligence to a final determination or to any termination whatever, and that this defendant was entitled to make final entry and payment for the said mining ground and premises, and to receive a patent therefore, and at the same time the said Immel, as register aforesaid, did transmit all the papers in and relating to the said application and adverse claim to the Commissioner of the General Land Office of the United States, at Washington, District of Columbia. That the said Commissioner affirmed and approved the said ruling and decision of the said register and receiver aforesaid, and directed them, the said register and receiver, to give notice to the said E. H. Rose, and other plaintiffs herein, that they would have sixty days within which to appeal from the said
53 decision of said Commissioner of the General Land Office to the Secretary of the Interior, which said notice was afterwards given in writing to said plaintiffs, and was in fact received by said Rose, took no steps and made no motion or proceedings in the said action, nor did the said plaintiffs take any appeal from the said decision of the said Commissioner of the Land Office to the Secretary of the Interior; and that afterwards the said Commissioner of the General Land Office held and decided that the patent should issue for the said mining claim and premises to this defendant, and the same was actually thereafter in fact issued on the 7th day of May, A. D. 1877, to this defendant; that these proceedings were had in the land office at Eureka, Nevada, at the instance of the defendant in such action without giving any notice to the plaintiffs in such action of its intention to make application to be allowed to enter and purchase the mining ground in controversy, and without moving the court in which such action was pending for a dismissal of such action for want of prosecution, and at a time when the plaintiffs believed from representations made to them by the officers and agents of the defendant would exclude in its application for patent all that portion of the Uncle Sam location which lies west of said west end line of said Tip Top claim extended northerly
54 through the side lines of said Uncle Sam location, and at a time when the attorneys of plaintiffs believed that a settlement would be agreed upon, and that there was no necessity for a trial in such action. When the decision of the local land office at Eureka, Nevada, was made, permitting the defendant in such action to make such entry and purchase, no notice was given to the plaintiffs of that decision, and no opportunity was given them to appeal from such decision to the Commissioner of the General Land Office if they had so desired.

Twenty-sixth. That thereafter, to wit, on the —— day of April, A. D. 1880, this cause was, on the motion of counsel for the plaintiffs herein, replaced upon the calendar of this court for trial; that from and after the date of the location and discovery of the said St. George mining claim and lode herein, the defendant herein, the Richmond Mining Company of Nevada, has been actually in possession of the said lode as in the said patent described, and has been

engaged in mining and extracting the precious metals therefrom, and had expended thereon and thereunder and in and upon that portion of the same which was in conflict between the St. George and Uncle Sam location the sum of at least $60,000, in gold coin of the United States, in sinking winzes and running drifts, tunnels, and levels at a great depth below the surface of the earth, and
55 none of the excavations made by either party came in conflict with any of those made by the other.

Twenty-seventh. That heretofore, to wit, on the 30th day of September, 1878, the said E. H. Rose, J. W. Hixon, Geo. W. Merrill, and Seldon Hetzell sold and conveyed, by their deeds in due form of law, all and singular the said Uncle Sam lode, mine, and claim to the Uncle Sam Mining Company, which was at the date aforesaid a corporation, organized and existing under and by virtue of the laws of the State of California, and doing business in the county of Eureka and State of Nevada.

Twenty-eighth. That thereafter, to wit, on the — day of April, 1880, the said Uncle Sam Mining Company, by its deed in due form of law, sold and conveyed the said Uncle Sam mining claim and premises unto the Albion Consolidated Mining Company.

Twenty-ninth. That this action is now prosecuted by and under the direction and control of the said Albion Consolidated Mining Company, by the consent of the said E. H. Rose, J. W. Hixon, G. W. Merrill, and Selden Hetzel, the plaintiffs herein.

Thirtieth. That the mining ground is dispute lies between planes drawn vertically down through the end lines of the Victoria patented claim extended from the foot wall to the hanging wall of the lode.

56 The above comprise all the findings of fact found by the court and filed in said cause.

The following are the conclusions of law found by the court and filed in said cause:

First. That the said patent of the United States to the Richmond Mining Company of Nevada, the defendant herein, for the said St. George mine and premises in and to that portion thereof which was covered by the adverse claim of the said plaintiffs herein, is utterly void and of no effect, either in law or equity, for the reason that the St. George patent was issued without authority of law, while the land embraced in the *protest* against the issuance of the patent was reserved from sale as effectually, so far as the defendant's right to purchase the same under its St. George location was concerned, as though there had been a special act of Congress excluding it.

Second. That the patent of the United States heretofore issued to the defendant, the Richmond Mining Company of Nevada, for the said Victoria mining claim and premises is good and valid, and that the same does rest in the said defendants, the Richmond Mining Company of Nevada, a good and valid title in and to all that portion of the lode and premises lying easterly of the line K L, as shown on Exhibit "H" of the findings of facts herein, and each and

every part thereof, and that by virtue thereof the said de-
57 fendant is the owner at law and in equity of the said premises and of every part thereof.

Third. That the adverse claim of the defendant, the Richmond Mining Company of Nevada, in and to the said premises is not without right and invalid or void, but the same is good and valid.

Fourth. That the claim of right and title of the plaintiffs herein to the said premises lying east of said line K L is without right, and is wholly invalid and void at law and in equity; that a decree be entered quieting plaintiffs' ownership and right of possession to all of said lode and premises lying northwest of said line K L; that said decree shall quiet the ownership and right of possession in the defendant of all that portion of said lode and premises lying easterly of said line K L; that the injunction heretofore issued in this action restraining the defendant be dissolved, in so far as it relates to that portion of the lode and premises lying easterly of the said line K L; that said injunction against the defendant, in so far as it relates to the premises lying northwest and westerly of said line K L, be continued in full force perpetually; that the plaintiffs herein shall recover their costs.

HENRY RIVES,
District Judge.

The following are the exhibits referred to in and made a part of these findings:

58 EXHIBIT "A."

Laws of Eureka Mining District.

EUREKA VALLEY, LANDER CO., N. T.,
Sept. 19th, 1864.

SECTION 1. This district shall be known as the Eureka Mining District, and shall be bounded as follows, viz: Beginning at the place where Eureka creek or canyon crosses Simpson's old road, as laid out by him in the year 1859, thence following said road westerly to a spring in the Middle Gate; thence southerly along the summit of the mountains to the first valley; thence easterly along the base of the mountains to Simpson's old road; thence northerly and along Simpson's old road to the place of beginning.

SECTION 2. There shall be a recorder elected at this meeting, who shall hold his office until the first Monday of September, A. D. 1865. He may appoint a deputy or deputies, for whose official acts he shall be responsible.

The recorder or one of his deputies shall go upon the ground, at the request of the locator, and see that the locator measures and stakes off his claim or claims when visible. The recorder or his deputy shall call all meetings when requested by ten claim-holders, of the district, and preside at the same. The recorder shall keep, in a suitable book or books, a faithful and true record of all claims brought to him for that purpose, if such claims do not conflict

59 with other claims. He shall record all claims in the order of their presentation, for which service he shall receive seventy-five cents for each claim recorded. He shall record all certificates of work done on claims, when he is satisfied that the necessary work has been done; he shall give certificates of location or abstracts of title, for which service he shall be entitled to receive fifty cents; also to keep his books for the inspection of those interested in the mines of the district. He shall deliver his books to his lawful successor. All examinations of his books or papers to be made in his presence or that of a deputy.

SECTION 3. Claims of mining ground shall be made by posting a written notice on the claimant's ledge, defining its boundaries if visible. A notice of mining ground by companies or individuals on file in the recorder's office shall be equivalent to a record of the same. Each claim shall consist of 200 feet on the ledge, but claimants may consolidate their claims by locating in a common name, so that in the aggregate no more ground is claimed than 200 feet for each name. Claimants may hold 100 feet on each side of their ledge for mining and building purposes, but shall not be entitled to any ledge within said distance by virtue thereof.

Each locator shall be entitled to all dips, spurs, and angles connecting with his ledge. All claims shall be recorded within ten days from the date of location.

60 SECTION 4. Whenever one hundred dollars ($100) worth of labor shall have been expended on any company's claim, or twenty-five dollars ($25) worth on any individual's claim, the same shall be deemed a fee-simple in the owners or owner thereof, and their or his grantee and assigns, and shall not thereafter be subject to relocation by other parties, except by producing to the recorder a writing acknowledging the abandonment thereof.

SECTION 5. All persons holding mining ground at the present time in this district, and all persons hereafter and previous to the date herein mentioned, shall hold the same exempt from relocation until the first Monday in June, 1865. These rules and laws may be altered or amended by a two-thirds vote of those owning claims or mining grounds in this district, after twenty days' notice of such intention shall have been given in the Reese River Reveille or some other paper published in Lander county, and shall have been posted in the most public place in this district.

SECTION 6. The laws, rules, and regulations of the Reese River Mining District, so far as not inconsistent with the foregoing rules and laws, shall, and the same are hereby extended to and over this district, and made the laws, rules, and regulations thereof.

61 SECTION 7. Elections shall be held *viva voce*, unless otherwise determined by those present at the meeting.

At an election held in the aforesaid district on the 19th day of September, A. D. 1864, the foregoing laws and rules for the district were adopted and the undersigned duly elected recorder.

G. J. TANNEHILL, *President.*

E. A. PHELPS, *Secretary.*

EXHIBIT "B."

Deposit Locations.

EUREKA DIST., *Sept.* 27, 1869.

At a meeting of the miners of Eureka District, called on the 27th of February, 1869, S. J. Hope was chosen chairman, and C. A. Stetefeldt, secretary.

On motion the following resolutions and amendments to the old laws of the district were adopted:

Whereas explorations have made it evident that the mineral in Eureka District is found more frequently in the form of deposits than in true fissure veins or ledges, and the laws of the district do not provide for the location of such deposits; and—

Whereas this deficiency in the law may give rise to expensive litigation, as it is the case in White Pine, a district of similar character, the miners of Eureka District have adopted the following amendments to the old laws of the district:

62 SECTION 1. Claims of mineral ground may be located as deposits:

SECTION 2. A deposit claim shall consist of a piece of ground 100 feet square, and such a piece of ground shall be designated as a "square."

SECTION 3. The locator of a square claims all mineral within this ground to an indefinite extent.

SECTION 4. The discover of a deposit shall be entitled to *two* squares.

SECTION 5. The claims taken up on one deposit shall not cover more ground than eight squares.

SECTION 6. A prospector shall be allowed to make a deposit location and have the same filed for record without having discovered ore on the surface; but his location shall not be finally recorded if he does not find and expose mineral within thirty days from the time of filing said location for record.

SECTION 7. The corners of deposit ground shall be designated by stone monuments or stakes.

SECTION 8. Ten dollars' worth of work for each square shall hold the ground for six months.

On motion A. Monroe was elected recorder.

SAMUEL J. HOPE,
Chairman.

CHAS. A. STETEFELDT,
Secretary.

63 EXHIBIT "C."

IN THE U. S. LAND OFFICE,
EUREKA, NEVADA, *Sept. 29th*, 1873.

In the matter of the application for patent to mining lands—Notice No. 221.

To the Honorable the Commissioner of the General Land Office; to C. F. Horn, Esq., register of the land office at Eureka aforesaid; to the Richmond Mining Company of Nevada, and to all others whom it may concern:

You will please take notice that E. H. Rose and J. W. Hixon claim adversely to the applicant for patent in the application No. 221, the notice of application being in the words and figures following, to wit:

Application for Patent No. 221.

U. S. LAND OFFICE,
EUREKA, NEV., *August 1st*, 1873.

Notice is hereby given that the Richmond Mining Company of Nevada (post office address, Eureka, Eureka county, Nevada) have made application for patent for fifteen hundred (1500) linear feet of the St. George lode, bearing silver, lead, and other minerals, running northeasterly from the northeast boundary of the Lookout claim (patent survey No. 43), with a width of 215 feet, situate in Eureka Mining District, Eureka county, Nevada, and described by plat and field-notes on file in this office, as follows, viz:

64 U. S. Survey No. 66—Commencing at a point in stone monument marked St. George S. W. bor., it being the N. W. corner of patent survey No. 43 on the Lookout lode, whence the entrance to main incline of the Richmond mine bears S. 66 degrees W. 218 feet, and the flag staff on the Main street in the town of Eureka bears N. 64 deg. 42 min. E. 10,386 feet, and thence running first N. 34¼ deg. W. 1,500 feet; thence N. 38 deg. E. 215 feet; thence S. 34¼ deg. E. 1,500 feet; thence 38 deg. W. 215 feet to the place of beginning, containing 6.94 acres.

Courses expressed from the true meridian with variation of 16½ deg. E. This claim is on unsurveyed lands, and is bounded on the southwest by the Richmond Mining Company of Nevada and the Poorman lode, and on the southeast by the Eureka Consolidated Mining Company.

This claim is recorded in Book E, page 114, of the Eureka mining records, and a copy of said notice and diagram can be found posted on the S. W. corner of said St. George patent survey.

CYRUS F. HORN, *Register.*

And protest against any further proceedings being had thereunder on behalf of said applicant, and in support of said adverse claim and protest allege and show—

First. That these adverse claimants are citizens of the United States, of the age of 21 years and upwards, as will more fully appear by the affidavits hereunto annexed, marked Exhibits A & B,
65 hereby referred to and made a part hereof.

Second. That heretofore, to wit, on the 14th day of January, A. D. 1872, (and long prior to the location of the so-called St. George ledge or vein wherefor a patent is above applied) the aforesaid J. W. Hixon and E. H. Rose and one Louis Milton claimed, located, and entered into the possession of the "Uncle Sam" mine, vein, and ledge. A certified and verified copy of the record of location being hereunto annexed, marked Exhibit "C," hereby referred to, and made a part hereof.

Third. That thereafter, to wit, on the 2nd day of March, A. D. 1872, the said Milton by his indenture of deed conveyed his entire interest in said Uncle Sam mine and ledge to E. H. Rose (the original deed of conveyance being hereunto annexed, marked Exhibit "D," hereby referred to, and made a part hereof), and that the said Rose and Hixon, these adverse claimants, are now the sole owners of, in possession of, and entitled to the possession of said Uncle Sam vein, mine, and ledge.

Fourth. That these adverse claimants have in all respects fully complied with the laws of the United States, of the State of Nevada, and of Eureka Mining District; that on said January 14th, 1872, being the day of the discovery and location of the Uncle Sam, the notice of location (see Exhibit "C,") was posted in a conspic-
66 uous place on said mine; that thereafter, and on the same day, the said notice was duly recorded in the mining records of the district as above set forth; that within less than one year after location as aforesaid these adverse claimants performed work upon in opening and developing said mine and ledge, and thereon expended over $100 in U. S. gold coin, and up to this date have expended over $160 in labor thereon, reference being had to a certified transcript of the mining laws of Eureka Mining District hereto annexed, marked "E," and made a part hereof.

Fifth. That the so-called St. George lode or vein, wherefor a patent is applied, is identical with the Uncle Sam vein and lode above described, and is not the property of the applicant for patent but of these adverse claimants; that is to say, within the end lines of the Uncle Sam claim, being the easterly and westerly boundaries thereof—the nature and extent of the conflict being more particularly set forth in the diagram of the deputy mineral surveyor hereunto annexed, marked Exhibit "F," and made a part hereof.

(Here follows diagram, marked p. 66.)

Wherefore these adverse claimants pray that the above application for patent be rejected.

GEO. W. MERRILL AND
SELDEN HETZEL,
Attorneys for Adverse Claimants.

1

67 STATE OF NEVADA, } ss:
County of Eureka, }

E. H. Rose, being duly sworn, says: That he is one of the above adverse claimants; that he has heard read the foregoing protest and knows the contents thereof, and that the same is true of his own knowledge; that the said Hixon is absent from this county; wherefore this affiant only verifies this protest.

E. H. ROSE.

Erasures made before administering oath.

Sworn and subscribed to before me, this 29th day of September, A. D. 1873.

CYRUS F. HORN, *Register*.

EXHIBIT "A."

STATE OF NEVADA, } ss:
County of Eureka, }

Wm. M. Gates, being duly sworn, says: That he is justice of the peace and *ex-officio* registry agent of Eureka township, Eureka county, Nevada, duly elected and qualified, and as such has charge of the registry books; that in said books he finds J. W. Hixon registered as a voter, the registry entry being as follows, to wit: Date, July 24th, '72; name, J. W. Hixon; age, 26; place of birth, United States; residence, Prospect Hill. And further says not.

WM. M. GATES.

Subscribed and sworn to before me, this 29th day of Sept., 1872.

CYRUS F. HORN, *Register*.

68 EXHIBIT "B."

STATE OF NEVADA, } ss:
County of Eureka, }

E. H. Rose, being duly sworn, says: That he is a citizen of the United States; that he has never renounced or forfeited his citizenship, and is entitled to all the rights and privileges thereof; that he was born in the State of Ohio, of parents both citizens of the United States, in the year 1841.

That J. W. Hixon is absent from this county and land district, and his testimony cannot be obtained, and that the foregoing affidavit (Exhibit "A") is the best evidence obtainable of said Hixon's citizenship; that the Hixon therein mentioned is, to this affiant's personal knowledge, the J. W. Hixon the co-adverse claimant of affiant.

E. H. ROSE.

Subscribed and sworn to before me, this 29th day of Sept., 1873.

CYRUS F. HORN, *Register*.

EXHIBIT "C."

Uncle Sam.

The undersigned claim eight hundred (800) feet on this ledge, lode, or mineral deposit, this monument and notice being the center of the claim, as the lead may run. This shall be known as the "Uncle Sam" mine, and is situated on the northwesterly slope of Ruby Hill, about one thousand feet (1,000) northwesterly
69 from the Tip Top mine, Eureka Mining District, Lander county, Nev., January 14th, 1872.

J. W. HIXON.
E. H. ROSE.
LOUIS MILTON.

Filed for record, January 14th, 1872.

GEO. W. KINNEY,
Mining Recorder.

STATE OF NEVADA, }
County of Eureka, } ss:

M. G. Cavanagh, being duly sworn, says: That he is the mining recorder of Eureka mining district aforesaid; that the above is a full, true, and correct copy of the record of location of the Uncle Sam mine in the mining records of said district.

M. G. CAVANAGH.

Subscribed and sworn to before me, this 29th day of Sept., A. D. 1873.

CYRUS F. HORN, *Register.*

EXHIBIT "E."

STATE OF NEVADA, }
County of Eureka, } ss:

M. G. Cavanagh, being duly sworn, says: That he is the duly elected mining recorder of the Eureka Mining District, county and State aforesaid, and has charge of the aforesaid records and laws thereof.

That the following is a full, true, and correct abstract from said laws of all provisions respecting the amount of work neces-
70 sary to be done upon a mining claim upon a vein, lode, or ledge within said district; that said law was adopted Sept. 19th, 1864, and has never since been amended or modified:

SECTION 4. Whenever $100 (one hundred dollars) worth of labor shall have been expended on any company's claim, or $25 on any individual's claim, the same shall be deemed a fee simple in the owners or owner thereof, and their or his grantees and assigns, and shall not thereafter be subject to re-location by other parties, except by producing to the recorder a writing acknowledging the abandonment thereof.

And further says not. M. G. CAVANAGH.

Subscribed and sworn to before me, this 29th day of Sept., A. D. 1873.

CYRUS F. HORN, *Register.*

EXHIBIT "D."

[U. S. Int. Rev. stamp, conveyance, 1 dollar. Nevada State revenue 50c. stamp. Nevada State revenue 50c. stamp.]

This indenture, made the second (2nd) day of March, in the year of our Lord one thousand eight hundred and seventy-two, between Louis Milton, of the town of Eureka, Lander county, and State of Nevada, the party of the first part, and Eli H. Rose, of the same place, the party of the second part, witnesseth:

71 That the said party of the first part, for and in consideration of the sum of one thousand (1,000) dollars, gold coin of the United States of America, to him in hand paid by the said party of the second part, and the receipt whereof is hereby acknowledged, has remised, released, and forever quit claimed, and by these presents does remise, release, and forever quit claim, unto the party of the second part, to his heirs and assigns, all those certain lots, piece, or parcels of land situate, lying and being in the Eureka Mining District, county of Lander, State of Nevada, and bounded and particularly described as follows, to wit: All my right, title, and interest in and to and of the following-described mining claims, viz:

First. An undivided two hundred (200) feet of, in, and to that certain mining claim, ledge, lode, or deposit located, owned, and held by and in the name of the "Star of the West," on the 2nd day of May, A. D. 1870, and recorded in the said Eureka Mining District on the 10th day of May, A. D. 1872.

Second. An undivided three hundred (300) feet of that certain mining claim, ledge, lode, or deposit located, owned, and held by and in the name of the "Star of the West No. 2," on the 2nd day of May, A. D. 1870, and recorded in said district on the 10th day of same month.

72 Third. An undivided four hundred (400) feet of that mining claim, ledge, lode, or deposit located by and in the name of the "Cincinnati," on the 6th day of May, A. D. 1870, and duly recorded in the record of said district on the 10th day of same month and year. Each of said claims containing 600 feet in all, and are situate near the "Mountain Boy."

Fourth. An undivided two hundred (200) feet in that mining claim, ledge, lode, or deposit located in the name of the "West Point," on the 14th day of April, A. D. 1871, and recorded in the records of Eureka Mining District on the 24th day of April, A. D. 1871, situate on Adams Hill.

Fifth. An undivided one-third ($\frac{1}{3}$) of that mining claim located, owned, and held by and in the name of the "Uncle Sam," on the 14th day of January, A. D. 1872, and duly recorded in the records of said district on the same day, containing in all 800 feet and situate on Ruby Hill; together with all the dips, spurs, angles, and variations of the said ledges, lodes, or deposits, and all the metals, ores, gold, and silver therein contained, and all ores and rocks now at or upon the same, and all the rights, franchises, and privileges to each and every of the said mining claims belonging or appertain-

ing; and also together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and
73 remainders, rents, issues, and profits thereof; and also all the estate, right, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] LOUIS MILTON.

Signed, sealed, and delivered in the presence of—
C. J. LANSING.

STATE OF NEVADA, }
County of Eureka, } ss:

On this 2nd day of March, A. D. one thousand eight hundred and seventy-two, personally appeared before me, C. J. Lansing, a notary public in and for said county of Lander, Louis Milton, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and said Louis Milton duly acknowledged to me that he executed the
74 same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[SEAL.] C. J. LANSING,
Notary Public.

(Endorsed:) Louis Milton to E. H. Rose. Deed. Dated March 2nd, 1872. Recorded at the request of Wm. Adams, March 4th, A. D. 1872, at 5 minutes past 7 p. m. Liber 40 of Deeds, page 468. H. J. Bidleman, recorder. C. J. Lansing, attorney, Eureka, Nevada. M. 32849. Div. No. 14. Protest of Uncle Sam Location *vs.* St. George. Filed Sept. 29th, 1873. Cyrus F. Horn, register. Notified all parties Sept. 29th, 1873.

EXHIBIT "E."

General Land Office, No. 886. Mineral Certificate No. 164.

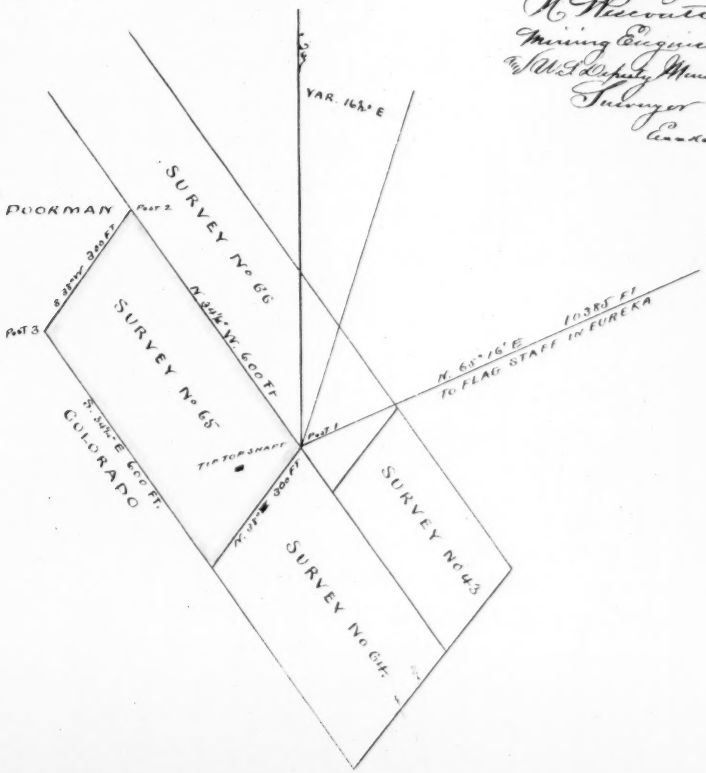
The United States of America to all to whom these presents shall come, Greeting:

Whereas in pursuance of the act of Congress approved July twenty-six, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes;" the act amendatory thereof, approved July

Plat of the claims of the Richmond Mining Company of Nevada upon the Tip Top Lode
Eureka Mining District, Eureka County, Nevada
Containing 3 99/100 acres
Scale 200 ft to an inch Mg Var. 16° 30' E

No. 248.
Richmond Mining Co. } p. 46.
of
Rowlette

Copied by
N. Hancock
Mining Engineer
& U.S. Deputy Mineral
Surveyor
Eureka Nevada



ninth, eighteen hundred and seventy, and the act approved
75 May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of the Richmond Mining Company of Nevada upon the Tip Top lode, accompanied by the certificate of the register of the land office at Eureka, in the State of Nevada, whereby it appears that in pursuance of said acts of Congress the Richmond Mining Company of Nevada did, on the 30th day of August, A. D. 1873, enter and pay for said mining claim or premises, being mineral entry No. 164 in the series of said office, designated by the surveyor general as lot No. 65, embracing a portion of the unsurveyed public domain in the Eureka Mining District, in the county of Eureka and State of Nevada, in the district of lands subject to sale at Eureka, embracing three (3) acres and thirty-nine hundredths (39-100) of an acre of land, more or less, and according to the returns on file in the General Land Office bounded, described, and platted as follows, with magnetic variations at sixteen (16) degrees thirty (30) minutes east, to wit: Beginning at a post marked "Tip Top S. E. Cor.," and "Richmond N. E. Cor.," the same being the northeasterly corner of survey No. 64, made for the claim of the Richmond Mining Company
76 of Nevada upon the Richmond lode, from which the Tip Top shaft bears south seventy-one (71) degrees west at the distance of one hundred and forty (140) feet, and the flag-staff in Main street, in town of Eureka, bears north sixty-five (65) degrees fifteen (15) minutes east, at the distance of ten thousand three hundred and eighty-five (10385); thence from said post north thirty-four (34) degrees fifteen (15) minutes west six hundred (600) feet to post marked "Tip Top N. E. Cor.;" thence south thirty-eight (38) degrees west three hundred (300) feet to post marked "Tip Top N. W. Cor.;" thence south thirty-four (34) degrees fifteen (15) minutes east six hundred (600) feet to an iron pin and stone monument at northwesterly corner of said survey No. 64; thence north thirty-eight (38) degrees east three hundred (300) feet to the place of beginning; containing three (3) acres and ninety-three hundredths (93-100) of an acre of land, more or less, and embracing six hundred (600) linear feet of the said Tip Top lode, as represented by yellow shading in the following plat:

(Here follows diagram, marked p. 76.)

Now know ye that the United States of America, in consideration of the premises, and in conformity with said acts of Congress, have given and granted, and by these presents do give and grant, unto the said Richmond Mining Company of Nevada, and to their successors and assigns, the said mining premises hereinbefore
77 described as lot No. 65, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of six hundred (600) linear feet of the said Tip Top vein, lode, ledge, ore

deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits, throughout their entire depth, the tops or apexes of which lie inside the exterior boundary-lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits. And provided further that nothing in this conveyance shall authorize the grantee, their successors or assigns, to enter upon the surface of a mining claim owned or possessed by another.

78 To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Richmond Mining Company of Nevada, and to their successors and assigns, forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 65, with six hundred (600) linear feet of the Tip Top vein, lode, ledge, or deposit for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depth as aforesaid the top or apexes of which lie inside the exterior lines of said survey; but subject to the right of other parties to follow any vein or lode with its dips, angles, and variations legally held under a location made prior to May 10th, 1872.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, ore deposit, the top or apex of which lies outside of the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

79 Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of the State of Nevada may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land to be hereunto affixed.

Given under my hand, at the city of Washington, the thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

By the President.

[SEAL.] U. S. GRANT,
By S. D. WILLIAMSON,
Secretary.

Recorded Vol. 10, pages 223 to 228. Examined.
L. K. LIPPINCOTT,
Recorder of the General Land Office.

(Endorsed:) United States to Richmond Mining Com-
80 pany. Mineral certificate No. 164. Tip Top Lode. Dated April 30, 1874. Recorded at request of J. J. Corrigan, Sept. 12th, A. D. 1874, at 30 minutes past 11 o'clock a. m. in Liber three of Deeds, pages 21 to 25, Eureka county, Nevada, Records. T. J. Tenant, recorder.

EXHIBIT "F."

General Land Office, No. 2265. Mineral Certificate No. 278.

The United States of America to all to whom these presents shall come Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of the Richmond Mining Company of Nevada, upon the St. George mine, accompanied by the certificate of the register of the land office at Eureka, in the State of Nevada, whereby it appears that in pursuance of the said Revised Statutes of the United States, Richmond Mining Company of Nevada did, on the twenty-seventh day of October, A. D. 1876, enter and pay for said mining claim or premises, being mineral entry No. 278 in the series of said office, designated by the surveyor general as lot No. 66, embracing a portion of the unsurveyed public
81 domain in the Eureka Mining District, in the county of Eureka and State of Nevada, in the district of lands subject to sale at Eureka, containing six acres and ninety-four hundredths ($6\frac{94}{100}$) acres of land, more or less, and, according to the returns on file in the General Land Office, bounded, described, and platted as follows, with magnetic variations at sixteen (16) degrees thirty (30) minutes east, to wit:

Beginning at corner No. 1, a post in mound of stone marked "St. George S. W. Cor.," the same being the northwesterly corner of survey No. 43 patented to the Eureka Consolidated Mining Company with its claim upon the Lookout lode, from which the entrance to main incline on the Richmond lode, survey No. 64, patented to the Richmond Mining Company of Nevada bears south sixty-six (66) degrees west at the distance of two hundred and eighteen (218) feet and flag-staff on Main street in the town of Eureka bears north sixty-

four (64) degrees forty-two (42) minutes east, at the distance of ten thousand three hundred and sixty-eight and four-tenths (10,368 $\frac{4}{10}$) feet; thence from said corner No. 1 north thirty-four (34) degrees fifteen (15) minutes west along the northeasterly boundary of said survey No. 64 one hundred and one and five-tenths ($101\frac{5}{10}$) feet to the northeasterly corner of said survey No. 64 and the southeasterly corner of survey No. 65, patented to the Richmond
82 Mining Company of Nevada, with its claim upon the Tip Top lode, fifteen hundred (1,500) feet along the northeasterly boundary of said survey No. 65 to corner No. 2, a post marked St. George N. W. Cor.; thence north thirty-eight (38) degrees east two hundred and fifteen (215) feet to corner No. 3, a post marked St. George N. E. Cor.; thence south thirty-four (34) degrees fifteen (15) minutes east fifteen hundred (1,500) feet to corner No. 4, a post marked Post No. 3, U. S. S. No. 43, the same being a corner of said survey No. 43; thence south thirty-eight (38) degrees west along the northwesterly boundary of said survey No. 43 two hundred and fifteen (215) feet to the place of beginning; containing six (6) acres and ninety-four hundredths ($6\frac{94}{100}$) of an acre of land, more or less, and embracing fifteen hundred (1,500) linear feet of said St. George mine, as represented by yellow shading in the following plat:

(Here follows diagram, marked p. 82.)

Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Richmond Mining Company of Nevada, and to its successors and assigns, the said mining premises hereinbefore described as lot No. 66, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exte-
83 rior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1,500) linear feet of the St. George mine, vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey:

Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits; and provided further, that nothing in this conveyance shall authorize the grantee herein, its successors or assigns, to enter upon the surface of a mining claim owned or possessed by another; to

Survey No 66.

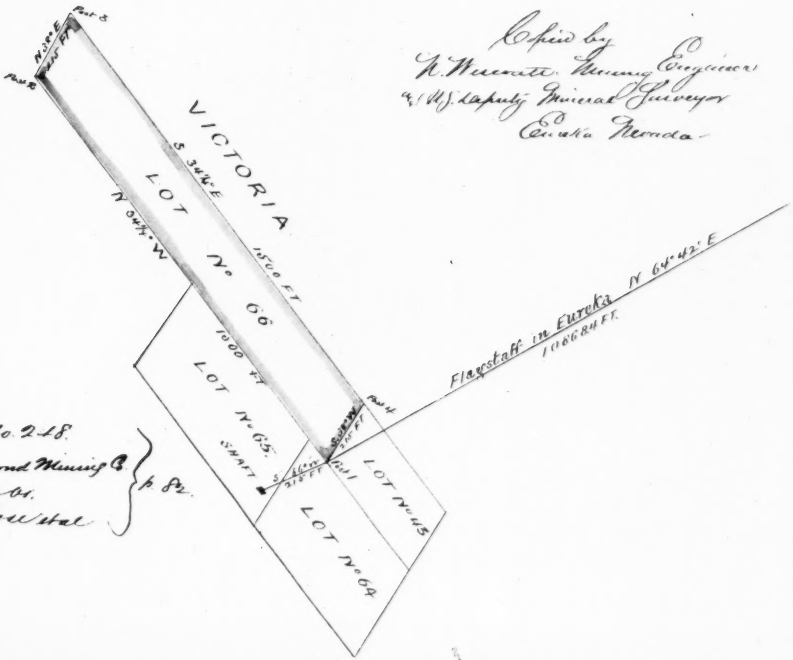
Plat of the claim of the Richmond Mining Company of Nevada upon the St. George Lode

Eureka Mining District, Eureka County Nevada

Containing 6 94/100 Acres

Scale 300 ft to an inch Var 16° 30' East

Copied by
R. Wunnette Mining Engineer
& U.S. Deputy Mineral Surveyor
Eureka Nevada



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have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever
84 nature thereunto belonging, unto the said Richmond Mining Company of Nevada, and to its successors and assigns, forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 66, with fifteen hundred (1,500) linear feet of the St. George mine, vein, lode, ledge, or deposit for the length aforesaid, throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or dedosit, the top or apex of which lies outside the exterior lines of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of the courts.

85 Fourth. That in the absence of necessary legislation by Congress, the Legislature of Nevada may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused the letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the seventh day of May, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

By the President:

[SEAL.] R. B. HAYES.
By D. D. CANE, *Secretary.*

Recorded vol. 27, pages 141 to 146, inclusive. Examined.
S. W. CLARK,
Recorder of the General Land Office.

EXHIBIT "G."

General Land Office, No. 3755. Mineral Certificate No. 387.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised
86 Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the

United States the plat and field-notes of survey of the claim of the Richmond Mining Company of Nevada, upon the Victoria lode, accompanied by the certificate of the register of the land office at Eureka, in the State of Nevada, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the Richmond Mining Company of Nevada did, on the twenty-third day of December, A. D. 1878, enter and pay for said mining claim or premises, being mineral entry No. 387 in the series of said office, designated by the surveyor general as lot No. 161, embracing a portion of the unsurveyed public domain, in the Eureka Mining District, in the county of Eureka and State of Nevada, in the district of land subject to sale at Eureka, containing sixteen (16) acres and fifteen-hundredths (15-100) of an acre of land, more or less, and according to the return on file in the General Land Office bounded, described, and platted as follows, with magnetic variations at sixteen (16) degrees thirty (30) minutes east, to wit: Beginning at corner No. 1, a post marked No. 1, "U. S. Survey No. 161," the same being post No. 1 of the survey No. 149, patented to the Eureka Consolidated Mining Company with its claim upon the Lupita lode, from which the flag-staff in the town of Eureka bears north sixty-
87 three (63) degrees thirty (30) minutes east at the distance of ninety-nine hundred and sixty (9960) feet, Ruby Hill No. 1 bears south thirty-four (34) degrees thirty (30) minutes west at the distance of three hundred and fifteen (315) feet, and the Victoria shaft bears south fifty-one (51) degrees fifteen (15) minutes west at the distance of sixty-six and one-half (66½) feet; thence from said corner No. 1 along boundary of said survey No. 49 south thirty-eight (38) degrees west two hundred (200) feet to corner No. 2, a post marked No. 2, U. S. Survey 161, the same being post No. 8 of said survey No. 49, post No. 1 of survey No. 47, patented to the Eureka Consolidated Mining Company with its claim upon the At Last lode, and post No. 1 of survey No. 43, patented to the Eureka Consolidated Mining Company with its claim upon the Lookout lode; thence north thirty-four (34) degrees thirty (30) minutes west four hundred (400) feet to corner No. 3, a post marked No. 3, U. S. Survey No. 161, the same being post No. 3 of said survey No. 43; thence north thirty-eight (38) degrees east fifteen (15) feet to corner No. 4, a post marked No. 4, U. S. Survey No. 161, the same post No. 4 of survey No. 66, patented to the Richmond Mining Company of Nevada with its claim upon the St. George lode; thence north thirty-four (34) degrees fifteen (15) minutes west eleven hundred
88 and one and five-tenths, 1101 5-10, feet to corner No. 5, a post marked No. 5, U. S. Survey No. 161; thence north thirty-eight (38) degrees east one hundred and eighty (180) feet to corner No. 6, a post marked No. 6, U. S. Survey No. 161; thence south thirty-four (34) degrees thirty (30) minutes east three hundred (300) feet to a post No. 3 of survey No. 160, made for the Silver Region lode, thirteen hundred and forty-four and eight-tenths (1344 8-10) feet to a point on the northwesterly boundary of survey No. 107, made for the Utah lode; from which post No. 1 of said survey No. 107 bears south thirty-three (33) degrees west at the distance of sev-

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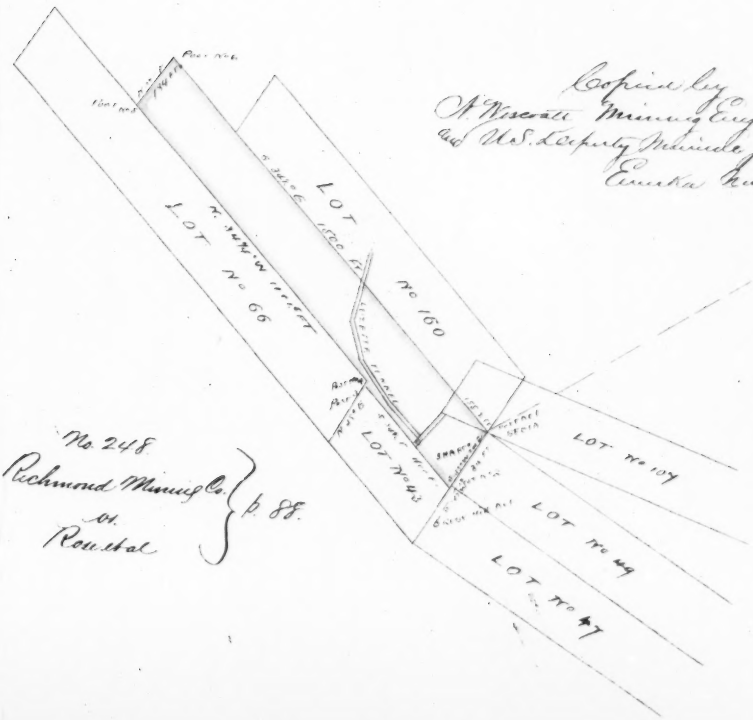
Plat of the claims of the Richmond Mining Company of Nevada upon the Victoria Lode

Eureka Mining District. Eureka County, Nevada

Containing 6 $\frac{55}{100}$ acres

Scale 300 feet to an inch. Var 16° 30' East



Copied by
A. Wiseman Mining Engineer
and U.S. Deputy Mineral Surveyor
Eureka Nevada

No. 248
Richmond Mining Co.
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} p. 88.

enty-three and seven-tenths (73 7-10) feet fifteen hundred (1500) feet to the place of beginning, containing six (6) acres and fifteen hundredths (15-100) of an acre of land, more or less, and embracing fifteen hundred (1500) linear feet of the said Victoria lode, as represented by yellow shading in the following plat:

(Here follows diagram, marked p. 88.)

Now know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Richmond Mining Company of Nevada, and to its successors and assigns, the said mining premises hereinbefore described as lot No. 161, embracing a portion of
89 the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1500) linear feet of the said Victoria vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth the tops and apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey.

Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes, drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits; and provided further, That nothing in this conveyance shall authorize the grantee herein, its successors or assigns, to enter upon the surface of a mining claim owned or possessed by another. To have and to hold said mining premises, together with all the
90 rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Richmond Mining Company of Nevada, and to its successors and assigns, forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 161, with fifteen hundred (1500) linear feet of the Victoria vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth, as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

(Here follows diagram, marked p. 90.)

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein,

lode, ledge, or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches, reservoirs used in connection with such water rights as may be recog-
91 nized and acknowledged by the local laws, customs, and decisions of the courts.

Fourth. That in the absence of necessary legislation by Congress, the Legislature of Nevada may provide rules for working the mining claim or premises hereby granted involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the President:

[SEAL.] R. B. HAYES.
By WM. H. CROOK, *Secretary.*

Recorded vol. 47, pages 17 to 24 inclusive. Examined.
S. W. CLARK,
Recorder of the General Land Office.

That thereafter, to wit, on the 7th day of Sept., 1881, the court having fully considered the law, rendered its judgment and decree in said cause, and on said day caused the same to be filed, of which the following is a copy, to wit:

92 (Title of Court and Cause.)

This action coming on for trial before the court, and the parties appearing by their attorneys, and having in open court waived a trial by jury, and the court having duly heard and considered the evidence, oral and documentary, offered by the respective parties, and having duly found and filed its findings of fact and conclusions of law thereon:

Now, therefore, it is ordered, considered, and adjudged that the claim of title and right of possession of the plaintiffs to that portion of the mining claim, lode, and premises in controversy, described in plaintiff's complaint as the Uncle Sam, lying between the end lines of the Victoria patented claim of defendant, extended from the quartzite foot wall to the shale hanging wall, and lying southeasterly of the line "K L," drawn on the diagram Exhibit "H," annexed to the findings herein, and the diagram marked Exhibit "A," annexed hereto, said line being a continuation of the northwest end line of the said Victoria claim from the quartzite foot wall to the

shale hanging wall, is without right and wholly invalid and void, and that the claim of the defendant thereto and to the right of possession thereof is good and valid.

It is further ordered, considered, and adjudged that the plaintiffs' claim of title and right of possession to that portion of said
93 mining claim and premises lying between said shale hanging wall and the quartzite foot wall to the northwest of said line "K L" is good and valid.

It is further ordered, considered, and adjudged that the defendant is the owner, in the possession of, and entitled to the possession of all of said mining claim, lode, and premises first above described, lying between the end lines of the said Victoria mining claim extended from the quartzite foot wall to the shale hanging wall.

It is further ordered, considered, and adjudged that the plaintiffs are the owners of, in possession of, and entitled to the possession of all that portion of said mining claim and premises lying between the quartzite foot wall and the shale hanging wall to the northwest of said line "K L."

It is further ordered, considered, and adjudged that the injunction heretofore granted in this action restraining the defendant be vacated and dissolved in so far as it relates to that part of the lode or premises easterly of said line "K L," and that said injunction in so far as it relates to the premises northwest and westerly of said line "K L" be continued against defendant in full force perpetually.

It is further ordered, considered, and adjudged that the
94 plaintiffs do have and recover of and from the defendant their costs, taxed at ($405.95) four hundred and five 95-100 dollars.

Judgment rendered Sept. 7, A. D. 1881.

HENRY RIVES,
District Judge.

The foregoing constitute all the pleadings, the opinion of the court in said cause, the findings of facts and the conclusions of law filed therein, and the judgment and decree of the court in said cause, the judgment roll having been filed in said court on the 7th day of September, A. D. 1881.

The plaintiffs above named, claiming the right to appeal from the said judgment and decree of the court herein so rendered and filed on the said 7th day of Sept., A. D. 1881, and desiring a statement of the cause to be annexed to the record of said judgment and decree, have prepared and proposes the foregoing as such statement on appeal, and do herein and hereafter state specifically the particular errors or grounds upon which appellants intend to rely on such appeal, and which are as follows, to wit:

Specifications of Error.

First. Error of the court in adjudging that the claim of title and right of possession of the plaintiffs to that portion of the mining lode, claim, and premises in controversy described in plaintiffs' com-

plaint as the Uncle Sam, lying between the end lines of the
95 Victoria patented claim of defendant, extending from the quartzite foot wall to the shale hanging wall, and lying southeasterly of the line "K L" drawn on the diagram Exhibit "A," annexed to the judgment and decree herein, said line being a continuation of the northwest end line of the said Victoria claim from the quartzite foot wall to the shale hanging wall, or to any part or parcel of said Uncle Sam lode, claim, and premises is without right, invalid, and void, and in adjudging that the claim of the defendant thereto, or to any part thereof, or to the right of possession thereof, is good and valid.

Second. Error of the court in adjudging that defendant is the owner, in the possession, and entitled to the possession of that portion of the mining claim, lode, and premises described in plaintiffs' complaint and therein designated as the Uncle Sam, lying between the end lines of the aforesaid Victoria mining claim, extending from the quartzite foot wall to the shale hanging wall, or of any part or portion of said lode, claim, and premises.

Third. Error of the court in vacating and dissolving the injunction heretofore granted in this action restraining the defendant, in so far as it relates to that part of the lode or premises easterly of said line "K L," as shown on said diagram "A," and in not
96 making the said injunction perpetual as to such portion of said lode and premises.

Fourth. Error of the court in failing to adjudge plaintiffs to be the owners, in the possession, and entitled to the possession of all that portion of the said claim, lode, and premises described in their complaint and designated as the Uncle Sam, lying northwest of the northwesterly end line of the Tip Top claim, as found by the court and designated on the map, Exhibit "H," as line "A C," and in adjudging the defendant to be the owner, in the possession, or entitled to the possession of any part of the aforesaid portion of said lode, claim, and premises.

Fifth. Error of the court in finding as a conclusion of law that the patent of the United States heretofore issued to the defendant, the Richmond Mining Company of Nevada, for the Victoria mining claim and premises described in the findings of fact is good and valid, and in finding as a conclusion of law that said patent vests in defendant a good and valid title in and to all that portion of the lode and premises lying easterly of line "K L," as shown on Exhibit "A" of the findings of fact herein, and in finding as a conclusion of law that by virtue thereof the said defendant is the owner at law and in equity of the said premises and of every part thereof.

97 Sixth. Error of the court in finding as a conclusion of law that the adverse claim of the defendant in and to the said premises is not without right and invalid or void, but that the same is good and valid.

Seventh. Error of the court in finding as a conclusion of law that the claim and title of the plaintiffs herein to the premises lying easterly of the said line "K L" is without right and is invalid and void.

Eighth. Error of the court in failing to find and adjudge the patent of the United States for the Victoria claim is invalid, void, and of no effect.

Ninth. Error of the court in failing to find and adjudge that the defendant, the Richmond Mining Company of Nevada, holds the apparent legal title to the premises in controversy, derived by it from the United States, under and by virtue of its patent for the St. George lode and claim, in trust for the plaintiffs, to the extent of plaintiffs' adverse claim, as shown in the protest filed in the land office, attached to findings, and that said defendant should convey to plaintiffs such portion of the said lode and premises.

Tenth. Error of the court in failing to find and adjudge that defendant, the Richmond Mining Company of Nevada, holds apparent legal title to the premises in controversy, derived by it from the United States, under and by virtue of its patent for the Victoria lode and claim, in trust for the plaintiffs, to the extent
98 of the conflict between the said Victoria claim and the claim of plaintiffs, and that said defendant should convey to plaintiffs such portion of the said lode and premises.

Eleventh. Error of the court in rendering a judgment for the defendant for that portion of the said Uncle Sam claim and lode lying southeasterly of the said line "K L."

Twelfth. Error of the court in failing to render judgment for the plaintiffs for that portion of the said Uncle Sam claim and lode lying southeasterly of said line "K L."

Respectfully submitted.

BAKER & WINES,
Attorneys for Plaintiffs.

Service of the above and foregoing statement on appeal accepted and acknowledged, by copy, after the filing thereof, this 22d day of September, A. D. 1881.

THOS. WREN,
Attorney for Defendant.

(Endorsed:) Filed Sept. 22d, 1881. Chas. J. R. Buttlar, clerk.

This certifies that the foregoing statement on appeal has been agreed upon by the undersigned, attorneys for plaintiffs and defendant in said cause, and is correct.

BAKER & WINES,
Attorneys for Plaintiffs.
THOS. WREN,
Attorney for Defendant.

Dated September 27, 1881.

99 STATE OF NEVADA, } ss:
County of Eureka, }

I, Chas. J. R. Buttlar, county clerk and *ex-officio* clerk of the district court, six judicial district, in and for said county, do hereby certify that the above and foregoing is a correct and true copy of the statement on appeal in the action of E. H. Rose & others *vs.* The

Richmond Mining Company of Nevada, heretofore pending in said district court, now on file in my office at Eureka, county and State aforesaid, and also of the certificate attached to said statement, made and signed by the attorneys in said cause, declaring the said statement to have been agreed upon, and that it is correct.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the town of Eureka, this 27th day of September, A. D. 1881.

[SEAL.] CHAS. J. R. BUTTLAR,
County Clerk.

Certificate of Clerk.

STATE OF NEVADA, }
County of Eureka, } ss:

I, Chas. J. R. Buttlar, county clerk and *ex-officio* clerk of the district court, sixth judicial district, in and for said county, do
100 hereby certify that I have compared the foregoing transcript with the original papers in the above-entitled action now on file in my office, and that the said transcript is correct.

I further certify that a sufficient undertaking on appeal in due form of law was, on the 27th day of September, A. D. 1881, properly filed in said cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in the town of Eureka, this 27th day of September, A. D. 1881.

[SEAL.] CHAS. J. R. BUTTLAR,
County Clerk.

101 *Supreme Court Decision.*

E. H. ROSE *et al.*, Appellants,
vs.
RICHMOND MINING COMPANY OF NEVADA, Respondent. } No. 1089.

Opinion by HAWLEY, J.

This action was brought by appellants to determine the right of possession to certain mining ground.

The cause was tried before the court without a jury. A judgment was rendered in favor of respondent. No motion for a new trial was made. The appeal is taken from the judgment.

Appellants claim that upon the facts found by the court the judgment should have been in their favor.

The following diagram shows the relative positions of the Tip Top, St. George, and Victoria locations, relied upon by respondent, and of the Uncle Sam location, upon which appellants rely.

From the findings of the court it appears that the mining ground in controversy is situated on Ruby Hill, in the Eureka Mining District; "that along and through the hill for a distance slightly exceeding a mile, and extending in a northwesterly and southeasterly direction, is a zone of limestone, in which at different places throughout its length mineral is found;" that underlying this zone on the

southerly side is a well-defined, unbroken foot wall of quartzite, which has a general dip to the northeast; that on the northerly side of this zone of limestone is a hanging wall of shale, and that this zone of limestone is a vein or lode of rock in place, bearing gold, silver, lead, and other valuable minerals.

That the Uncle Sam mining claim was located upon this
102 zone of limestone on the 14th day of January, A. D. 1872, by E. H. Rose and two other persons; that they included in said location 800 linear feet of said zone, 200 linear feet having been located for a discovery claim; that they recorded the notice of location in due time, and marked the boundaries of the claim before the St. George was located; that several years prior to the location of the Uncle Sam claim said zone had been discovered and a large number of mining claims located upon it; that Rose knew of the existence of said locations, and that work was being prosecuted thereon; that at the time of the location of the Uncle Sam, and for a long time prior and subsequent thereto, it had been the custom and usage of the larger portion of the miners upon this zone or lode to include in their locations 200 feet for a discovery claim; that it was not known or believed at the time of the location of the Uncle Sam that the belt or zone of limestone running through Ruby Hill constituted but one zone or lode; that the locators of the Uncle Sam believed there was no other valid existing location upon the ground included within the surface boundaries of their location; that a mining claim called the Philips was located on the 23d day of September, A. D. 1871, by Philips and others upon the identical ground afterwards located by the Uncle Sam; that the Philips claim and location was abandoned prior to the location of the Uncle Sam; that Rose, prior to the location of the Philips, had discovered the ore within the limits of the Uncle Sam location.

"That Rose and his associates made the Uncle Sam location in good faith and in accordance with the customs and usages of the majority of the miners in said mining district, and they and their grantees have ever since remained in the actual possession of said Uncle Sam location as located to the extent of annually sinking a shaft thereon, maintaining and at times occupying a cabin thereon, and * * * excavating drifts and tunnels thereon; * * * that Rose and his co-locators did the amount of work required to hold said mining claim under the laws of the United States, and their successors in interest continued to do the necessary work to hold said claims after succeeding to the interest of Rose and his co-locators up to the time of this trial;" that none of said work was done within the surface limits of the St. George, but was done within the surface lines of the Uncle Sam location.

That the St. George claim was located on the 20th day of March, 1873, subsequent to the location of the Uncle Sam; "that from and after the date of the location and discovery of the St. George mining claim and lode herein * * * the Richmond Mining Company of Nevada has been actually in possession of the said lode, as in the said patent described, and has been engaged in mining and extracting the precious metals therefrom, and * * * in sinking winzes

and running drifts, tunnels, and levels at a great depth below the surface of the earth, and none of the excavations made by either party came in conflict with any of those made by the other."

(Here follows diagram, marked p. 102.)

That respondent, on the 1st day of August, 1873, made an application, through the local United States land office at Eureka, for a patent to the St. George mining claim; that on the 29th day of September, 1873, and within the period allowed by law for publication of notice, Rose and his associates filed a protest in said land office, which showed the boundaries and extent of their claim against said application; that on the 21st day of October, 1873, they filed the complaint in this action in the office of the clerk of the district court of Eureka county; that at that time they did not pay the docket fee required by the statute of this State (2 Comp. L., 2,766); that the docket fee was advanced and paid by the clerk to the county treasurer, in his regular monthly settlement, on the 3d day of November;

103 that respondent regularly appeared in said action and filed a demurrer and answer; that it did not at any time move to dismiss said action or file a plea in abatement therein.

That after said cause was at issue it was regularly placed upon the calendar for trial; that thereafter it remained on the calendar until the March term, 1874, but was not tried, for the reason that negotiations were pending for a settlement of the matters in controversy; that at the March term, 1874, the cause was continued upon motion of counsel for respondent, and thereafter the cause was not placed upon the calendar, nor any proceedings had until the March term, 1880; that negotiations for a settlement were still pending, and Rose and his associates were led to believe from representations made to them by the officers and agents of the Richmond Mining Company that it would abandon all claim to that portion of the Uncle Sam west of the west end line of the Tip Top claim, or that it would purchase the Uncle Sam claim, and it was owing to these facts that the prosecution of the suit was delayed; that in the month of September, A. D. 1876, the Richmond Mining Company made application to the land office at Eureka for final entry and payment for the St. George claim, and presented a certificate of the clerk of the district court to the effect that this action had not been placed upon the calendar, nor had any proceedings been had therein, after the March term, 1874; that the officers of the land department, upon this certificate, decided that this action had not been prosecuted with due diligence, and for this reason that the Richmond Company was entitled to a patent; that these proceedings were had without notice to plaintiffs, and at a time when they and their attorneys believed from the representations made by the officers and agents of the Richmond Company, as before stated, that a settlement would be agreed upon, and that there was no necessity for a trial; and the ruling of the officers of the land office at Eureka was approved by the Commissioner of the General Land Office at Washington, D. C.; that plaintiffs were notified of his decision, and informed that they would have sixty days within which to appeal from the decision to

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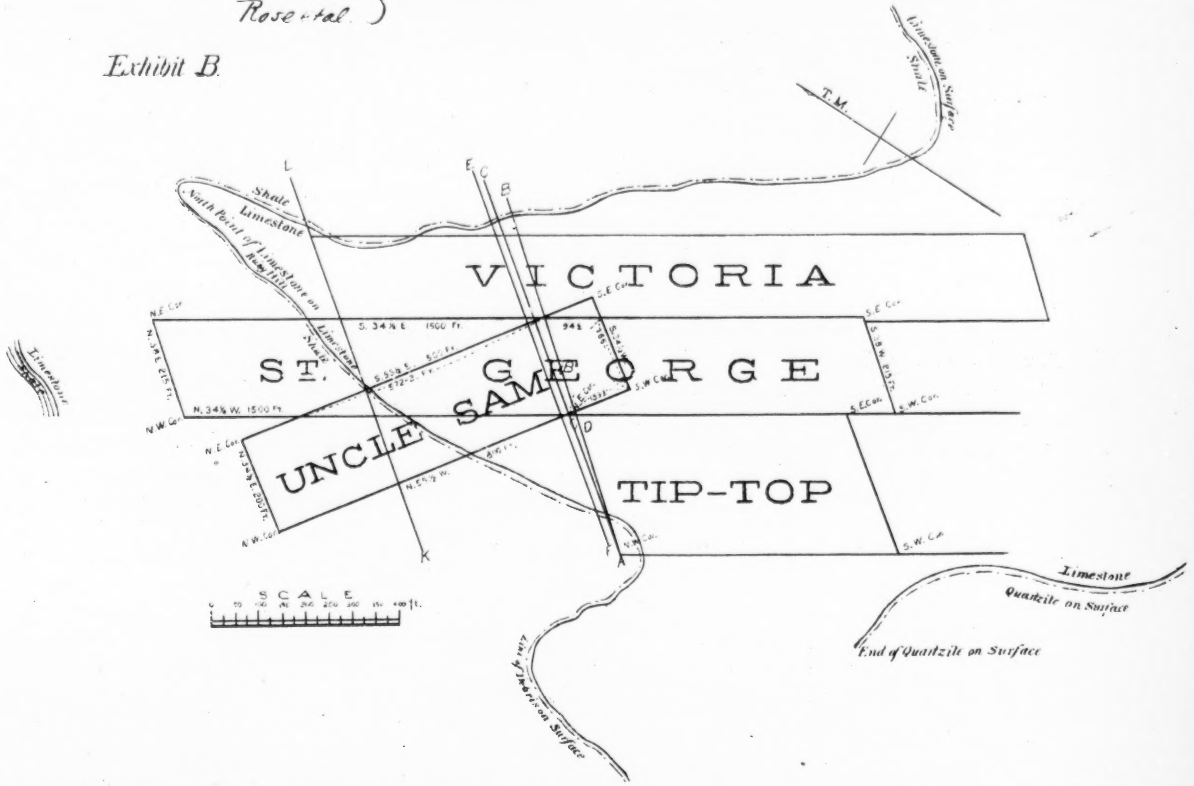
Rose et al.
} b. 102

Exhibit B.



the Secretary of the Interior; that they did not take any steps in the matter, and did not appeal from the decision; that thereafter, on the 7th day of May, 1877, the Government of the United States issued a patent to the St. George claim and lode to respondent.

That on the 30th day of April, 1874, the Government of the United States issued to respondent a patent to the Tip Top claim and lode.

That on the 18th day of October, 1878, the respondent made an application for a patent to the Victoria claim, which had been located subsequent to the location of the Uncle Sam, and procured a patent therefor from the United States on the 28th day of February, 1880; that no protest was filed against said application by the owners of the Uncle Sam claim.

That the Tip Top, St. George, Victoria, and the Uncle Sam claim are each upon the same vein or lode.

That at the time of the trial of this action the Albion Consolidated Mining Company was the owner of the Uncle Sam claim, and this action is prosecuted for its benefit by the consent of the plaintiffs.

All that portion of the mining ground within the limits of the Uncle Sam location, on the easterly side of the line "A" "C" on the diagram, belongs to the respondent by virtue of the Tip Top location and patent.

We have been thus particular in stating the facts in order that some of the questions which we will have occasion to discuss may be the more clearly comprehended.

The real controversy upon this appeal involves the validity of the Uncle Sam location, owned by appellants, and of the St. George and Victoria locations and patents, owned by respondent. There are, however, numerous preliminary questions to be first disposed of.

The case upon every point fairly bristles with legal and
104 technical objections urged by respondent. If any of the objections are well taken, the judgment should be affirmed. If none of them are tenable, the judgment must be reversed.

The various questions presented have been elaborately argued with marked ability.

From the interest thus manifested, as well as the importance of some of the questions involved, and the peculiar facts of the case, we deem it to be our duty to decide all the points that have been made; but in so doing we shall not attempt to answer all the reasons advanced by counsel. It is enough to state our opinion upon the points discussed, and to give the reason for our decision thereon.

1. It is claimed by respondent that the statement on appeal is defective because it does not contain any evidence or specify any error which occurred at the trial. This objection is without merit. No question is raised by appellants as to the sufficiency of the evidence to support the findings of facts. They do not rely upon any alleged error committed by the court during the progress of the trial. The statement does contain some, if not all, of the documentary evidence, and it was unnecessary to insert any more of the evidence taken at the trial in order to explain the particular errors or grounds specified in the statement on appeal.

The statement is sufficient to authorize this court to determine whether the findings of facts support the judgment of the district court, provided there is a proper specification of errors as required by section 332 of the civil practice act. (1 Comp. L., 1393.)

2. We are of opinion that this provision of the statute has been substantially complied with. It is true, as claimed by respondent, that in the assignment of errors it is not said, in direct terms, "that the judgment is contrary to the findings, or that upon the findings the judgment should have been for appellants;" yet such is the evident meaning and effect of the language used.

We believe it has been the usual practice, in cases like this, to make the general statement that the judgment is not supported by the findings, and to add a specific statement of the particular errors relied upon. But the general statement, the absence of which it is claimed is fatal without the particular specifications, would, according to many of the authorities cited by respondent, be insufficient.

It must be remembered that no objections are urged as to the sufficiency of the findings. They are not complained of by either party, but are accepted as correct by both, and must be so treated by this court. The only grounds, therefore, that could have been assigned as error were the alleged erroneous conclusions of law reached by the court upon the undisputed facts set forth in the findings.

Every conclusion of law of which complaint is made is separately specified as an error upon the part of the court. The form of the specifications may be subject to criticism, but the substance is there. Appellants have pointed out with great distinctness the specific errors which they claim the court committed, in its conclusions of law, in such a manner as to enable this court to readily understand the grounds upon which they rely for a reversal.

The specifications are given "with such fullness as to aid the court in the examination of the transcript," and this court is not left, as was the court in Squires *vs.* Foreman, (10 Cal., 298,) and other cases cited by respondent, "to grope its way through the record in search of possible errors."

The statement on appeal and the assignment of errors come within the rule announced by the decisions in Barrett *vs.* Tewksbury, (15 Cal., 356,) and Hutten *vs.* Reed, (25 Cal., 478,) and this court has never, in any of its decisions, suggested that any
105 further specification was necessary.

3. Respondent contends that the complaint does not state facts sufficient to constitute a cause of action. In deciding this question it is important to determine the nature of this action, for upon the character of the pleadings, especially of the complaint, depends the solution of many questions that have been elaborately and learnedly argued by counsel.

The complaint alleges "That the plaintiffs are, and ever since the 20th day of January, A. D. 1872, have been, the owners of, seized and possessed of," the mining ground in controversy, "together with all the veins, lodes and ledges throughout their entire depth, the top or apex of which lies within said surface boundaries; that defendant, unjustly and adversely to plaintiffs, claims an estate in fee in and

to said premises, and the right of possession thereof, and the right of extracting and converting to its own use all the mineral-bearing rock, ore and earth therein contained, and has filed in the United States Land Office an application for a patent thereto, under the name of the St. George ledge and mine," and closes with the usual prayer.

We will not follow counsel in that portion of their argument which is based upon the theory that this is a suit brought under the provisions of section 256 of the civil practice act. In our opinion the sufficiency of the complaint must be determined by the provisions of section 1674 of the Compiled Laws (Stat. 1873, 50), and section 39 of the civil practice act.

Section 1674 reads as follows:

"In all actions brought to determine the right of possession of a mining claim, or metalliferous vein or lode, where an application has been made to the proper officers of the Government of the United States by either of the parties to such action for a patent for said mining claim, vein, or lode, it shall only be necessary to confer jurisdiction on the court to try said action, and render a proper judgment therein, that it appear that an application for a patent for such mining claim, vein, or lode, has been made, and that the parties to said action are claiming such mining claim, vein, or lode, or some part thereof, or the right of possession thereof."

The objections to the complaint, under section 1674, are stated as follows:

"There is no allegation that the claim or application of the defendant for a patent is without right, or invalid or void, or that the plaintiffs ever filed any adverse claim to the defendant's application for patent. It does not appear from the complaint that any contest ever was initiated or was pending in the Land Office at the date of the commencement of this action."

The complaint is not defective, either under section 256 or section 1674, because it does not allege the particulars of defendant's claim and prove that it was invalid. (Scorpion S. M. Co. *vs.* Marsano, 10 Nev., 379; Golden Fleece G. and S. M. Co. *vs.* Cable Con. G. and S. M. Co., 12 Nev., 320.)

In the case last cited, Beatty, J., in delivering the opinion of the court, said: "A review of the question is, however, wholly unnecessary in this case, which is governed by the provisions of section 1674 of the Compiled Laws, * * * and evidently designed to supplement section 2326 of the Revised Statutes of the United States. * * * Under these laws the pendency of a contest in the Land Office, with respect to a mining claim, gives our district courts jurisdiction to determine the right of possession as between the adverse claimants. The contestant, whether he is in or out of possession, must commence his action to determine the right within thirty days after filing his adverse claim. It would be absurd to hold that, if he happens to be the party in possession, and therefore presumably entitled to the possession, judgment must go against him, in favor of a party out of possession, unless he not only proves

his own right affirmatively, but disproves the claim of the
106 defendant by negative testimony. The only sensible construction of the law is, that each party must prove his claim to the premises in dispute, and that the better claim must prevail."

It is claimed that this decision is in favor of respondent, upon the point that the pendency of the contest in the Land Office must be alleged. The complaint in that action averred that plaintiff had filed an adverse claim to the defendant's application for a patent, hence the statement in the opinion that the pendency of the contest in the Land Office gave the court jurisdiction, which is true; but the question here involved was not presented in that case, and the court did not decide that such an allegation was absolutely essential in order to give the court jurisdiction.

Section 1674 does not make the filing of the protest a jurisdictional fact to be alleged in the complaint, and in this respect it differs from the statute considered by the court in Berry *vs.* Camet, 44 Cal., 352, which is also relied upon by respondent.

It has, we believe, been the general practice in this State, in suits of this character, to allege the pendency of the contest in the Land Office, and the act of Congress (Rev. Stat., 2326) has reference to cases where an adverse claim is filed. But it does not attempt to confer any special jurisdiction upon the State courts.

In 420 M. Co. *vs.* Bullion M. Co., 9 Nev., 248, we said: "Congress did not, by the passage of this act, * * * confer any additional jurisdiction upon the State courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction, and institute such proceedings as they might, under the different forms of action therein allowed, elect, and there try 'the rights of possession' to such claim and have the question determined. The acts of Congress do not attempt to confer any jurisdiction not already possessed by the State courts, nor to prescribe a different form of action. * * * We are of opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our State courts, irrespective of the acts of Congress."

Section 1674 was evidently passed to supplement the act of Congress, as stated in the Golden Fleece case, and it designates the jurisdictional facts that are necessary to be alleged in the complaint. The complaint in this action substantially conforms to the language of the statute, and we are of opinion that, tested by the statute and the previous decisions of this court, it states facts sufficient to constitute a cause of action to determine the right of possession to the mining ground in controversy.

4. The claim of respondent that this action was not commenced in time is not well taken.

The complaint was filed within thirty days after the filing of the protest, as required by the statute.

It is true that the plaintiffs did not pay the docket fee (2 Comp. L., 2766–7), but it was advanced and paid by the clerk in his next

regular monthly settlement with the county treasurer. The findings are silent as to whether any summons was issued or not. They show, however, that defendant regularly appeared and filed a demurrer and answer to plaintiffs' complaint, and did not at any time move to dismiss the action, or file a plea in abatement. From these facts it is apparent that it cannot now be claimed that the action was not commenced in time.

The defendant by demurring and answering waived the issuance of summons. (4 Comp. L., 1085; Iowa Mining Company *vs.* Bonanza Mining Company, recently decided by this court.)

Respondent cannot take advantage of the fact that the clerk instead of the plaintiffs paid the docket fee.

107 The clerk had the right to refuse to put the case upon the docket unless the docket fee was paid by the plaintiffs. By entering it upon the docket he became personally responsible, and assumed the payment of the fee, and, having paid it, as he did, the rights of plaintiffs were preserved. The case stands precisely the same as if the summons had been issued, and the docket fee paid by plaintiffs on the day the complaint was filed.

5. The claim of respondent that the protest does not show "the nature, boundaries, and extent" of the Uncle Sam location and lode is untenable.

This objection is one that should, if relied upon, have been made in the land office when the protest was filed. It is questionable whether any objection could be urged against the protest after the commencement of the suit, especially in a case where no plea has been interposed to its sufficiency. But it is apparent that the protest does sufficiently show "the nature, boundaries, and extent" of the Uncle Sam claim and lode.

The respondent, in its application for a patent to the St. George location and lode, claimed 245 feet in width upon the surface. The Uncle Sam location claimed 200 feet in width upon the surface.

The protest avers "that the so-called St. George lode or vein, wherefor a patent is applied, is identical with the Uncle Sam vein and lode," and refers to the diagram to show "the nature and extent of the conflict." The protest, in its description of the "nature, boundaries, and extent" of the Uncle Sam location and lode, is as clear, definite, and specific as was the application presented by respondent for a patent to the St. George. If the protest is defective, so is the application. It would be absurd, in the first instance, to decide that the application was sufficient when it only claimed 245 feet in width on the surface, and then, in the next breath, declare that the protest was insufficient because it did not claim the entire width of the lode on the surface.

It is a conceded proposition that there is but one lode within the limits of the respective locations. It therefore necessarily follows, notwithstanding the fact that each party only claimed 200 feet in width on the surface, that whichever party has the better right to the possession of the lode will be entitled to its entire width and entire depth, although it may, in its downward course, so far depart

from a perpendicular as to extend outside the vertical side lines of the surface location.

6. It is strenuously insisted that appellants cannot maintain this action because, as respondent argues, the court found as a fact that it was in the actual possession of the mining ground in controversy at the time the action was commenced. This argument is principally based upon the ground that this action must be governed by the provisions of section 256 of the civil practice act. But it is also claimed that the same rule must prevail under the provisions of section 1674, notwithstanding the fact that it does not confine the rights of plaintiffs, as does section 256, to a party in possession.

We do not think the argument of respondent could be sustained even if the facts were, as it claims them to be, that it was the only party in the possession of the mining ground in controversy. (Golden Fleece *vs.* Cable Con. Co., 12 Nev., 321.)

The facts, however, show that both parties were in possession of different portions of the "big lode," and the character of their possession is particularly defined.

Under the statute the party having the better right to the possession of the lode must prevail, and is entitled to maintain this action.

It being admitted, as we have before stated, and will have occasion again to repeat, that there is but one lode, and that the Uncle Sam location, upon this lode, is prior in point of time to the St. George, it must follow that if the location of the Uncle Sam was valid in its inception, and its owners have not waived, lost, or
108 abandoned their rights, but have at all times complied with all the requirements of the law, appellants were and are the only parties legally in possession of the lode in controversy, and that respondent is not entitled to the "nine points of law" that are claimed for it and that often follow from the actual possession of property.

This must be true. If at the time the St. George location was made there was a prior, existing, and valid location upon this portion of the lode, and such location has ever since been legally maintained, then the subsequent location of the St. George upon this portion of the lode was absolutely null and void, and respondent did not, and could not, acquire any rights whatever by virtue of its location upon, or its possession of, this portion of the lode. A party cannot locate a valid claim to a mining claim or lode already located and legally possessed by others.

In Belk *vs.* Meagher, recently decided by the Supreme Court of the United States, Waite, C. J., in delivering the opinion of the Court, said: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go be-

yond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator but all the world, because the law allows no such thing to be done. * * * The right to possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

7. Is the Uncle Sam location invalid?

It is claimed by respondent that the locators of the Uncle Sam, by claiming a discovery interest, committed a fraud upon the Government, and that, by reason thereof, their entire claim is illegal and void. The act of Congress, under which this location was made, provides "that no location hereafter made shall exceed 200 feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode." (14 U. S. Stat., 252, Sec. 4.)

Appellants contend that the term discovery, as used in this act, is susceptible of more than one construction, and that the courts are justified in defining its meaning to be "a discovery made within the limits of the claim located." We are of opinion that a broad and liberal interpretation should be given to this statute. It must be construed with reference to the intent and object that Congress had in view at the time of its passage, and in determining this question it is proper to consider the condition of the country and the general character of the mineral deposits, veins, and lodes.

The object was evidently to encourage the location and development of mining claims. It was intended that the adventurous and enterprising prospector, who explored the mineral regions in search of the hidden treasure, should be rewarded by the Government with at least "an additional claim for discovery." The mineral lodes, in many mining districts, were concealed from public view. They did not always "crop out" upon the surface of the earth. There were no landmarks to definitely determine the length, width, distance, or course of the lode when discovered. It required much time, money, and labor, and in many cases protracted and expensive litigation to settle these disputed questions.

The facts of this case present a fair history of the condition
109 of many of the mining districts in this State, and eliminate from the case every question as to any intended fraud upon the Government. They show that Rose was the first discoverer of the ore body at the point of his location, and that he and his associates made the location in good faith, honestly believing that the location was not upon any lode that had been previously discovered by others. Subsequent developements established the fact that they were mistaken, and the owners of the Uncle Sam have been legally deprived of all that portion of their location on the easterly side of the line A C, within the boundaries of the Tip Top claim, and it also appears from the diagrams that over 200 feet of the Uncle Sam location, on the westerly end, extends beyond the limestone shale into the country rock. The fact that Philips made a

prior location to the same ground is not entitled to any consideration, because this location was abandoned prior to the location of the Uncle Sam.

In illustration of the evil results that would flow from sustaining respondents' construction of the law, let us suppose that A, in 1870, located a mining claim on the easterly end of Ruby Hill, including 200 feet for a discovery interest; that B two months thereafter went to the westerly end, a distance of over one mile, and made a location upon a body of ore, and believing it to be upon an entirely distinct lode from the one upon which A had made his location, claimed 200 feet for discovery; that for years afterwards numerous other parties came upon the hill and made divers other locations between the claims of A and B, each claiming 200 feet for discovery, and for ten or more years the various claims thus located were worked and developed upon the theory and belief that each was upon a separate and distinct vein or lode; and, after this lapse of time, the expenditure of several hundred thousand dollars, and long protracted and expensive litigation, it was ascertained, as it finally was on Ruby Hill (Eureka Consolidated Mining Company *vs.* Richmond Mining Company of Nevada, 4 Saw., 302), that there was but one lode, a zone of limestone containing precious metals, varying in width from 500 to 1,500 feet. The courts would have to say to B, and all the other subsequent locators who made locations on this great mineral zone—although their claims did not in any manner conflict with any previous locations made upon the lode—that their locations were absolutely void because the developments, brought about by time, labor, money, and litigation, had established the fact that they were all upon the same lode originally discovered and located by A. To so declare would not only make invalid most of the early locations on Ruby Hill, but would, in its effect, entirely upset and destroy, in many cases, the titles to mining property in the various mineral districts of this and other States and Territories. Nevertheless, if the law so directs, in plain and unequivocal terms, it is the bounden duty of the courts to follow its mandates, although by so doing it would result in great and manifold injustice. The responsibility would rest upon Congress, not upon the courts. But we are of opinion that such is not the meaning, object, or intent of the law, and that such a construction is not warranted either by the letter or spirit of the statute. The most that could possibly be claimed against the validity of the Uncle Sam location would be that it was voidable to the extent of the excess of 200 feet, and the owners of the claim could determine from which end, or ends, this excess should be taken. Nothing more than this result would follow from the reasoning of Beatty, J., in the Golden Fleece *vs.* Cable Con., *supra*, where an alien joins in making a location; or, from the views expressed by the supreme court of Idaho in Atkins *vs.* Hendree, where it was claimed that the locators had purposely included a greater number of feet than the law allowed, and the court said that "all the benefit that a subsequent locator can claim is
110 that he shall be entitled to maintain his right to the excess." (1 Idaho, 112.)

There is not any principle decided, or reason given, in either of these decisions inconsistent with the construction contended for by appellants that the statute intended to give 200 feet to the discoverer of the lode within the limits of his claim, and we are not prepared to say that such a construction is not warranted by the language of the statute. But, under the existing facts of this case, it is only necessary to decide that the Uncle Sam location is not entirely void; that, if voidable at all, it is only as to the excess of the discovery interest.

8. Is the St. George patent void?

The provisions of the act of Congress, to which we have already referred, and upon which this and other questions to be hereinafter discussed must be determined, read as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the Land Office, together with the certificate of the surveyor general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver $5 per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." (Rev. Stat. U. S., Sec. 2326.)

The language of this statute is clear, plain, and explicit.

When a patent is issued in pursuance of its provisions it would furnish the highest and best evidence of title which a party could obtain. In such a case, as was said by Field, J., in the Eureka case (4 Saw., 319), "a patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is iron-clad against all mere speculative inferences." But it is equally as clear, and as well settled, that, if the statute has not been complied with, and a patent is issued without authority of law, no substantial title is acquired.

The position taken by respondent that the officers of the Land Department of the Government had jurisdiction to declare the adverse

claim of appellant waived, by a failure on their part to prosecute this suit with reasonable diligence, cannot be sustained.

When this suit was commenced the district court acquired jurisdiction to try every question involved in the case, including the question of diligence in its prosecution. Congress did not intend that the Land Department should take any action until the controversy was finally determined in the State courts. The Department is not authorized to interfere with the proceedings in the courts. The statute declares the steps that must be taken, and by following its directions no conflict of authority can ever arise between
111 the Land Department and the courts. By departing from them endless confusion and expensive and unnecessary litigation will be bound to follow.

Secretary of the Interior Schurz, in overruling the decision of the Commissioner of the Land Office in the Iowa Mining Company *vs.* Bonanza Mining Company, gave a clear exposition of the act of Congress. He said: "This statute provides in plain terms that a failure on the part of an adverse claimant to prosecute his suit to judgment with reasonable diligence shall be a waiver of his claim, but it does not provide either in terms or by necessary implication that you shall decide what constitutes reasonable diligence while suit is pending in court. There can be no question but that the State court of Nevada has acquired jurisdiction over this cause, and it is equally clear that the object of the law was to require parties claiming an adverse interest to land included in an application for patent to try the right of possession and have the controversy determined by the State courts before a patent was issued. 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause.' (Elliott *vs.* Piersal, 1 Pet., 340.) The question of diligence in the prosecution of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case, and one which, after the court has acquired jurisdiction, should be left for its determination. I do not think it was the intention of Congress that you should decide what constitutes reasonable dilligence in the prosecution of a suit pending in a court of competent jurisdiction, for such a proceeding would necessarily interfere with matters which the court alone should determine. Under such a practice it might occur in which you would hold that reasonable diligence had not been exercised, and issue a patent, while the court might hold otherwise and give judgment for the adverse claimant, and the result would be a conflict of authority and a confusion of titles. * * * I am of opinion that the proper practice in cases of this character is for the defendant, if in his opinion the suit is not prosecuted with reasonable diligence, to move the court to dismiss the case for want of prosecution, and if the motion is granted, cause the judgment to be certified to your office, when a patent can be issued without conflict with the jurisdiction of the courts or the rights of the parties in interest." (Sickel's Mining Laws, 290; Copp's Mineral Lands, 219.)

Equally plain and explicit is the opinion of Secretary Chandler, in City Rock *vs.* King of the West. "The plain meaning of this

section is that all contests which may arise in the disposal of the mineral lands shall be tried and determined, if tried at all, in a court of competent jurisdiction; that the adjudication and determination of that court shall be final, and a patent for the tract in controversy shall issue to the successful party or parties, upon showing further compliance therewith." After stating the objections raised by the protest he adds: "Both of these objections go to the merits of the case, and not to the form of the claim. It is unquestionably your duty as well as mine, when an adverse claim is presented for consideration, to examine it and determine whether the claimant has substantially set forth, under oath, its 'nature, boundaries, and extent;' but if a compliance with the law is shown in these particulars, and a suit has been instituted to determine the rights of the parties, I am of the opinion that we can proceed no further with the investigation. It is the duty of the court in which the suit is pending to determine all other questions relating to the controversy." (Sickel's Mining Laws, 296; Copp's Mineral Lands, 219.)

The facts of this case, as well as the decisions of the different Secretaries of the Interior, show the expediency, wisdom, and
112 propriety of Congress making provision, as it did, to have this question and all others arising in the action, to be settled and determined in the State courts. The certificate issued by the clerk "to the effect that this action had not been placed upon the calendar, nor had any proceedings been had therein from the March term, 1874," was true upon its face; but this fact, without showing the cause of the delay, conveyed to the officers of the Land Department an absolutely false impression and induced them, in an *ex parte* proceeding, to decide that the plaintiffs had not prosecuted the suit with reasonable diligence; whereas the truth was, as established at the trial, that defendant was responsible for the delay in the prosecution of the suit.

The necessity of giving courts of justice final jurisdiction to review the action of the Land Department even in cases where its officers have jurisdiction to act, is very clearly and forcibly stated by the Supreme Court of the United States in Johnson *vs.* Towley, wherein it was decided that "the Land Office, dealing as it does with private rights of great value in a manner particularly liable to be imposed upon by fraud, false swearing, and mistakes, exemplifies the value and necessity of this jurisdiction." (13 Wall., 72.) But in this case the officers of the Land Department had no jurisdiction to determine the question at issue. At the time the St. George patent was issued there was a valid and pending contest in the court to determine the right of possession to the mining ground and lode in controversy, and the act of Congress expressly declares that in such cases "all proceedings * * * shall be stayed until the controversy shall have been settled, or decided by a court of competent jurisdiction, or the adverse claim waived." The action of the Land Department was in violation of this provision of the statute. The Government of the United States, under the circumstances, had no more authority than a mere stranger to issue the patent. Its officers had no

jurisdiction to perform any act, and it could not legally issue a patent while a valid contest was pending in the State courts.

A patent issued without authority of law is void. (U. S. *vs.* Chapman, 5 Saw., 528; Polk's Lessees *vs.* Wendal, 9 Cranch, 87; Stoddard *vs.* Chambers, 2 How., 285; Morton *vs.* Nebraska, 21 Wall., 660; Sherman *vs.* Bruick, 93 U. S., 216.)

In Polk's Lessees *vs.* Wendal, the facts showed that the State of North Carolina attempted to grant lands to which she had no title or authority to grant. The court declared the patent void. Marshall, C. J., in delivering the opinion, said: "There are cases in which a grant is absolutely void, as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." (9 Cranch, 99.)

In Stoddard *vs.* Chambers, the facts showed that a patent had been issued at a time when the lands therein granted were expressly reserved from sale. McLean, J., in delivering the opinion of the court, said: "No title can be held valid which has been acquired against law; and such is the character of the defendant's title so far as it trenches on the plaintiff's. * * * The issuing of a patent is a ministerial act, which must be performed according to law. * * * It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol, but if it has been fraudulently obtained or issued against law, it is void. It would be a most dangerous principal to hold that a patent should carry the legal title, though obtained fraudulently or against law. * * * The patent of the defendant having been for land reserved from such appropriation, is void." (2 How., 318.)

From the views already expressed it is apparent that the district court was correct in its conclusion that the "St. George pat-
113 ent was issued without authority of law, while the land embraced in the application was reserved from sale as effectually as though there had been a special act of Congress excluding it, and that, therefore, it is absolutely void."

9. Is the Victoria patent valid? There is, as we have before stated, but one lode within the boundaries of the Uncle Sam, St. George, and Victoria locations. This lode was the coveted prize for which these locations were made, and for which the patents to the St. George and Victoria were issued. The apex of this lode is within the surface ground claimed by the Uncle Sam location, and throughout the argument it was conceded that if the owners of this location have in all respects complied with the law they will be entitled to the entire width of the lode. To repeat the facts: When respondent made its application for the St. George claim it included the identical lode which was afterwards embraced in its application for a patent to the Victoria. The owners of the Uncle Sam claim protested against this application and brought action in the State court, within proper time, to determine which party had the better right to the lode. They did not protest against the second application of respondent for a patent to the same lode under the name of the Victoria.

Field, J., (in Eureka Consolidating Mining Company *vs.* Richmond Mining Company of Nevada,) declared that under the act of Congress of 1872, "When one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, * * * the doctrine cannot be applied so as to cut off the rights of the earlier patentee, under a later location where no opposition to that location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority." (4 Saw., 318.)

These views are relied upon by respondent and claimed to be conclusive, in its favor, in support of the validity of the Victoria patent. But it will readily be seen, by an examination of that decision, that the question at issue here was not presented in that case, and the language of the eminent judge who delivered that opinion was not intended to, and does not, apply to a case like the present.

It seems to us that substantially the same reasons exist against the validity of the Victoria patent that exist against the St. George, and that if the court below was correct in declaring the St. George void, it necessarily follows by every method of sound reasoning known to the law, that it was wrong in the conclusion reached that the Victoria patent was valid.

At the time the Victoria patent was issued there was, as we have several times declared, a valid and pending contest between the respondent and appellants in the State court to determine the right of possession to the identical lode for which this, as well as the St. George, patent was issued. During the pendency of this contest the lode was reserved from sale.

In replying to the question asked by the surveyor general of Colorado: "Was the resurvey of the Crown Point lode, made after the filing of said adverse claim, and prior to the final disposition of the said application by this office, legal?" The Commissioner of the General Land Office said: "I would state that after an application has been made for patent for a given mining claim such claim is virtually withdrawn from market, pending the final disposition of the case." (Sickels' Mining Decisions, 116.)

The application of J. B. Haggin for patent to the Hurricane
114 lode was dismissed by the Commissioner "upon the ground that a great portion of the land applied for was included in the pending application of Andre Chavannes, and hence at the date of Haggin's application the same was not in market." (Sickels' Mining Decisions, 243.)

If the portion of the lode in controversy was reserved from sale, then no patent could issue for it until this suit is settled and determined by the courts.

A party, after applying for a patent to a mineral lode under a given name, cannot, after a contest is raised in the courts, and while it is pending, make a second application, under another name, to the same lode, and, after obtaining a patent therefor, stand in the doorway of the "temple of justice" and say to the adverse claimant, who regularly appeared and protested against the first application, "you cannot enter these halls to defend your rights, because you did not protest against my second application."

If a party could legally make a second application for the same lode, he could continue without limit. As soon as one protest was filed, he could immediately make another application to the same lode under a different name, and require the adverse claimant to protest against each application and to bring a separate and distinct action in each case, and make the same proofs, in order to determine the identical question at issue in the first suit. If this be the law, then a wealthy applicant could, in many cases, soon exhaust the purse, as well as the patience, of the adverse claimant, if he should unfortunately be limited in his means, however strongly he might be intrenched in the justice and right of his case.

We do not believe that the act of Congress requires such vain, useless, and expensive proceedings. It points out with unusual clearness the mode that each party must pursue, and when the parties have once regularly brought themselves within its provisions their respective rights must be heard and determined in the manner therein designated.

Under the facts of this case no patent could be legally issued by the Government of the United States to that portion of the lode in controversy until the question as to which party has the better right to the possession of the lode is disposed of by the courts, and then the party having such better right is, by pursuing the provisions of the statute, entitled to the patent. If this portion of the lode is not reserved from sale until the contest is disposed of, then the provisions of the act of Congress are a delusion and a snare—

> "That keep the word of promise to our ear and break it to our hope."

Numerous other reasons have been assigned by appellants against the validity of the Victoria patent, some of which only go to the extent of making it voidable instead of void; but in our opinion the views we have expressed are correct, and they are conclusive of the case. It follows therefrom that the Victoria patent, in so far as it attempts to convey to respondent any portion of the lode covered by the valid portion of the Uncle Sam location, is—like the St. George—absolutely null and void.

10. In cases where a patent is issued without authority of law there is no necessity to resort to a court of equity to have it declared void. The question of its invalidity can be raised and determined in any proceeding either in law or equity. The authority of the court to declare the St. George and Victoria patents void, under the pleadings in this action, is too well settled to require discussion. (See authorities heretofore cited in discussing the invalidity of the St. George patent; also Patterson *vs.* Tatum, 3 Saw., 173; Patterson *vs.* Winn, 11 Wheat., 380; Cooper *vs.* Roberts, 6 McLean, 93.)

11. The only remaining question is as to the form and character of the judgment which the district court should be directed to render in this case.

115 Appellants claim that they are entitled to a decree adjudging respondent to be the holder of the St. George and Victoria patents in trust for them, and to an order requiring it to convey to them all rights acquired thereunder, and have cited a great number of authorities, which they claim warrant such a course to be pursued.

In Johnson *vs.* Towsley, the Supreme Court of the United States said that if, for any reason "recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made upon the subject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of Stark *vs.* Starrs, 6 Wall., 402, convert him into a trustee of the true owner and compel him to convey the legal title." (13 Wall., 85.)

"The relief given in this class of cases," as was said by the court in Silver *vs.* Ladd, "is founded on the theory that the title which has passed from the United States to the defendant inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity, according to its forms, in several ways." (7 Wall., 228.)

But this course is only pursued in cases where the officers of the Government were authorized to act, and by an erroneous construction of the law or a misapplication of the facts issued the patent to the wrong party. This is not such a case. We have decided that both of these patents were absolutely void; that they were issued without authority of law at a time when the Land and Executive Department of the Government had no jurisdiction to act in the premises. The lode was reserved from sale; neither of the parties to this suit were entitled to a patent until the pending contest was finally settled and determined in the courts. If this be true, then the patents, in so far as they pretend to convey any portion of the lode within the limits of the Uncle Sam location, have no valid existence in the law. Respondent acquired no rights thereunder and has none to convey.

The judgment of the district court is reversed and the cause remanded, with instructions to the district court to render a proper judgment in favor of the plaintiffs in this action and against the defendant, in compliance with the views we have expressed, for all that portion of the mineral lode in controversy westerly of the westerly end line of the Tip Top claim, designated by the line A C on the diagram, and order the injunction against defendant to this portion of the lode to be made perpetual, and a judgment in favor of plaintiffs for their costs. A judgment should also be rendered in favor of defendant for all that portion of the lode easterly of the line A C.

HAWLEY, J.

We concur.

BELKNAP, J.

LEONARD, C. J.

[Endorsed:] Filed March 16, 1882. Chas. F. Bicknell, clerk.

116 *Judgment of the Supreme Court.*

E. H. Rose *et al.*, Appellants,
v.
The Richmond Mining Company of Nevada, Respondent. } No. 1089.

Appeal from the Sixth District Court, Eureka County, Nevada.

The above-entitled cause came regularly on to be heard, at a former day, and counsel for appellants and respondent appeared, and were severally heard in oral argument, and thereupon the same was submitted and taken under advisement by the court.

And now on this day all and singular the law and the premises having been seen, heard, and fully considered, the opinion of the court is delivered by Hawley, J., Belknap, J., and Leonard, C. J., concurring to the effect that the judgment of the lower court is reversed and cause remanded, with instructions to the district court
117 to render judgment in favor of plaintiffs in accordance with the views expressed in the opinion filed herein.

Whereupon it is now ordered, adjudged, and decreed by the court that the judgment of the district court of the sixth judicial district in and for the county of Eureka, State of Nevada, in the above-entitled cause, be, and the same is hereby, reversed and cause remanded. And the said district court is hereby instructed to render a proper judgment in favor of the plaintiffs in this action and against the defendant for all that portion of the mineral lode in controversy westerly of the westerly end line of the Tip Top claim, designated by the line A C on the diagram, which is made a part of the opinion filed herein; and the said district court is hereby further instructed to enter an order making the injunction against defendant to this portion of the lode perpetual, and to enter
118 a judgment in favor of appellants for their costs herein expended; also to render a judgment in favor of defendant for all that portion of the lode easterly of the line A C on the said diagram.

Judgment rendered March 16, 1882.

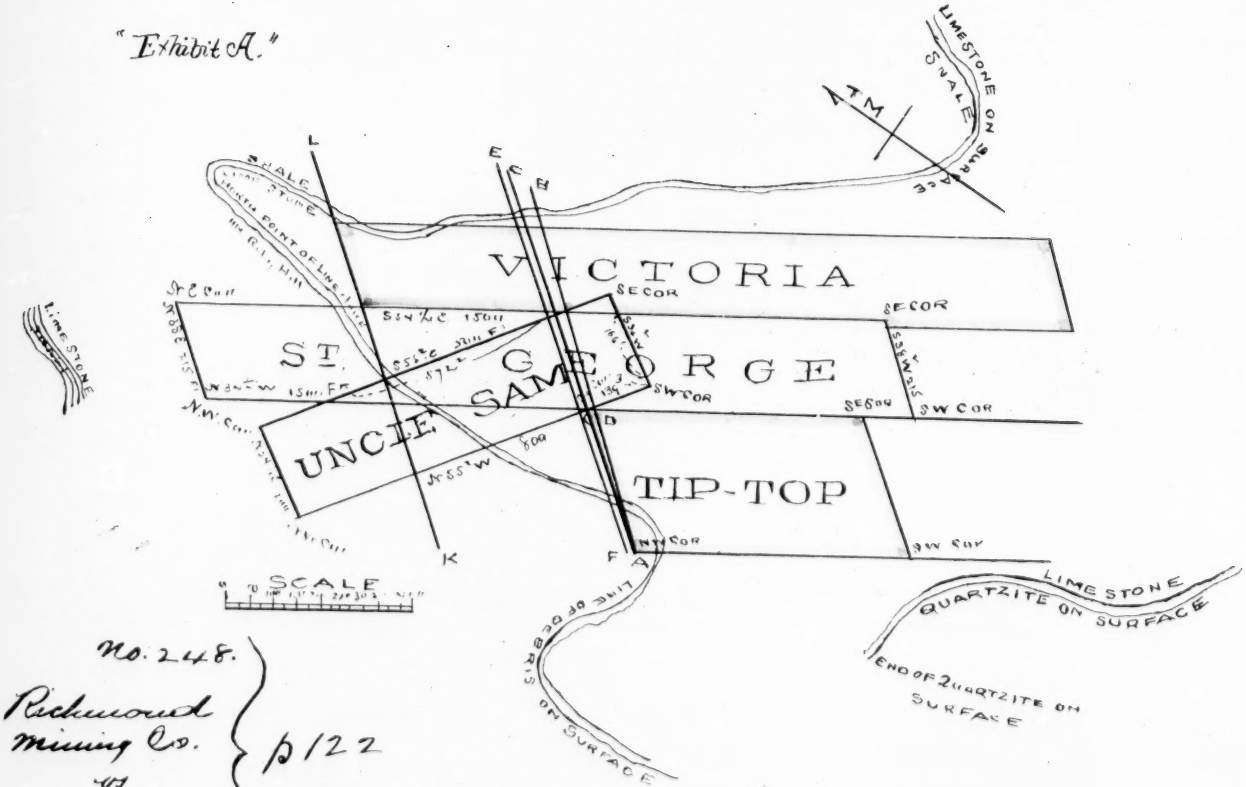
119 State of Nevada, *ss:*

I, Chas. F. Bicknell, clerk of the supreme court of said State of Nevada, do hereby certify the foregoing pages, from 1 to 118, inclusive, to be a true and correct copy of the transcript on appeal, the opinion and judgment of the supreme court of the State of Nevada in the cause of E. H. Rose *et al.*, appellants, *v.* The Richmond Mining Company of Nevada, respondents, now on file and of record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said supreme court, this 29th day of June, A. D. 1882.

[seal.] CHAS. F. BICKNELL, *Clerk.*

"Exhibit A."



No. 248.
Richmond Mining Co.
vs
Rowital

p 122

120 In the District Court of the Sixth Judicial District of the State of Nevada, within and for the County of Eureka.

E. H. ROSE, J. W. HIXON, SELDEN HETZEL, and GEORGE W. MERRILL, Plaintiffs,

vs.

THE RICHMOND MINING COMPANY OF NEVADA, Defendant.

Whereas the judgment of this court in the above-entitled action heretofore entered herein was appealed from to the supreme court of this State; and whereas said supreme court, in rendering
121 its opinion in the matter of said appeal, has instructed and directed this court to render a proper judgment in favor of the plaintiffs in this action and against the defendant, in compliance with the views expressed by said supreme court in its said opinion and judgment on appeal for all that portion of the mineral lode in controversy westerly of the westerly end line of the "Tip Top" claim designated by the line "A C" on the diagram annexed to the opinion and judgment of said supreme court, a copy of which said diagram is annexed hereto, and made a part hereof, marked "Exhibit A:"

(Here follows diagram, marked p. 122.)

123 And whereas said Supreme Court has directed the injunction heretofore ordered in this case against defendant to that portion of the lode to be made perpetual, and a judgment in favor of plaintiffs for their costs, and also a judgment in favor of defendant for all that portion of the lode easterly of said line "A C:"

Now, therefore, it is ordered, considered, and adjudged that the claim of title and right of possession of the defendant to that portion of the mining claim, lode, and premises in controversy described in plaintiffs' complaint as the "Uncle Sam" lode,
124 lying westerly of the northwest end line of the "Tip Top" patented claim of the defendant, extended from the quartzite foot wall to the shale hanging wall, and lying westerly of the said line "A C," drawn on the diagram "Exhibit A" herein, is without right, and wholly invalid and void; and that the claim of the plaintiff thereto and to the right of possession thereof is good and valid.

It is further ordered, considered, and adjudged that the plaintiffs' claim of title and right of possession to that portion of said mining claim and premises lying between the shale hanging wall and
125 the quartzite foot wall to the northwest and westerly of said line "A C," is good and valid.

It is further ordered, considered, and adjudged that the defendant is the owner, in the possession of, and entitled to the possession of all of said mining claim, lode, and premises lying to the easterly of the northwest end line of the "Tip Top" claim, which said end line is designated as the line "A C," extended from the quartzite foot wall to the shale hanging wall.

It is further ordered, considered, and adjudged that the plaintiffs are the owners of, in the possession of, and entitled to the possession

of all that portion of said mining claim and premises lying
126 between the quartzite foot wall and the shale hanging wall to the northwest of said line "A C."

It is further ordered, considered, and adjudged that the injunction heretofore granted in this action restraining the defendant in so far as it relates to that part of the lode or premises northwesterly of said line "A C," be continued against defendant in full force perpetually.

It is further ordered, considered, and adjudged that the plaintiffs do have and recover of and from the defendant their costs, taxed at ($405.95) four hundred and five 95-100 dollars.

HENRY RIVES,
Dist. Judge.

Judgment rendered April 25th, A. D. 1882.

127 STATE OF NEVADA, } ss:
County of Eureka, }

I, Chas. J. R. Buttlar, county clerk and *ex-officio* clerk of the district court, sixth judicial district, in and for said county of Eureka, State of Nevada, do hereby certify that the foregoing pages, from 124 to 136, inclusive, is a full, true, and correct copy of the judgment of said district court of the 6th judicial district in and for Eureka county, State of Nevada, in the case of E. H. Rose,
128 J. W. Hixon, G. W. Merrill, and Selden Hetzel *vs.* The Richmond Mining Company of Nevada, entered in said district court on the 25th day of April, A. D. 1882, by the direction and in compliance with the views expressed by the supreme court of the State of Nevada, in the opinion of said supreme court, filed in the clerk's office of said court on the 16th day of March, A. D. 1882.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the town of Eureka, this 19th day of July, A. D. 1882.

[SEAL.] C. J. R. BUTTLAR,
County Clerk & ex-officio Clerk of the District Court, 6th Judicial District, Eureka County, Nevada.
By EDWARD D. VANDERLIETH,
Deputy Clerk.

129 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the
[SEAL.] judges of the supreme court of the State of Nevada, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between E. H. Rose, J. W. Hixon, George W. Merrill, and Selden Hetzel, appellants, and the Richmond Mining Company of Nevada, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the

decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or
130 statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondent, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twentieth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

[Endorsed:] United States Supreme Court. Richmond Mining Company of Nevada, pl'ff in error, *vs.* E. H. Rose *et al.*, def'ts in error. Writ of error. Filed May 31, 1882. Chas. F. Bicknell, clerk supreme court of Nevada.

131 The United States of America to E. H. Rose, J. W. Hixon, George W. Merrill, and Selden Hetzel, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nevada, wherein the Richmond Mining Company of Nevada is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this twentieth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

On this 15th day of June, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared before
132 me, the subscriber, Thomas Wren, and makes oath that he delivered a true copy of the within citation to Messrs. Baker & Wines, attorneys for the plaintiffs in this case, defendants in error herein.

——— ———.

Sworn to and subscribed the 15th day of June, A. D. 1882.

[SEAL.] CHAS. J. R. BUTTLAR,
County Clerk and ex-officio Clerk 6th Dist. Court,
Eureka County, Nevada.

We hereby acknowledge service of the within citation by copy this 15th day of June, 1882.

BAKER & WINES,
Att'ys for Plaintiffs and Defendants in Error.

(Endorsed:) "Filed June 19, 1882. Chas. F. Bicknell, clerk supreme court, Nevada."

[Endorsed:] No. ——. In Supreme Court of the United States. The Richmond Mining Company of Nevada, pl'ff in error, *vs.* E. H. Rose *et al.*, def'ts in error. Cert. copy "citation." Filed ——, 188—. ———, clerk.

STATE OF NEVADA, *ss:*

I, Chas. F. Bicknell, clerk of the supreme court of said State of Nevada, do hereby certify the foregoing to be a true and correct copy of the original "citation" in the cause of the Richmond Mining Company of Nevada, pl'ff in error, *v.* E. H. Rose *et al.*, def'ts in error, now on file in my office.

In testimony whereof, I have hereunto set my hand and the seal of said supreme court, this 28th day of June, A. D. 1882.

[SEAL.] CHAS. F. BICKNELL, *Clerk.*

133 Know all men by these presents that we, Daniel Meyer, of San Francisco, State of California, and Jonas Meyer, of the same place, are held and firmly bound unto E. H. Rose, J. W. Hixon, George W. Merrill, and Selden Hetzel in the sum of twenty thousand $\frac{00}{100}$ dollars, good and lawful money of the United States, to be paid to the said E. H. Rose, J. W. Hixon, George W. Merrill, and Selden Hetzel, their executors or administrators, firmly by these presents. Sealed with our seals, and dated this sixth day of April, A. D. 1882.

Whereas in an action pending in the district court of the sixth judicial district of the State of Nevada, in and for the county of Eureka, wherein E. H. Rose, J. W. Hixon, George W. Merrill, and Selden Hetzel were plaintiffs, and the Richmond Mining Company of Nevada is defendant, in which said action an appeal was taken to the supreme court of Nevada by the said plaintiffs as appellants, and on said appeal the judgment of said district court was reversed and the cause remanded, with instructions to the district

court to render a proper judgment in favor of the plaintiffs in said action and against the defendant, in compliance with the views we (said court) have expressed, for all that portion of the mineral lode in controversy westerly of the westerly end line of the Tip Top claim, designated by the line A C on the diagram, and order the injunction against defendant as to said portion of said lode to be made perpetual and a judgment in favor of the plaintiffs for their
134 costs, and to render judgment for the defendant for all that portion of the lode easterly of the line A C; and whereas the said Richmond Mining Company of Nevada is about to prosecute a writ of error to the Supreme Court of the United States to reverse the said judgment of the said supreme court of the said State of Nevada:

Now, therefore, the condition of this obligation is such that if the said above named the Richmond Mining Company of Nevada shall prosecute its writ of error to effect, and shall answer all damages and costs, if *he* shall fail to make good *his* plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

DANIEL MEYER. [SEAL.]
JONAS MEYER. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Daniel Meyer and Jonas Meyer, being each severally duly sworn, deposes and says, each for himself, and not one for the other: That he has read the foregoing obligation, signed by himself as a party thereto, and that he is worth double the sum named therein as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident householder and freeholder within the ninth circuit and district of California.

DANIEL MEYER.
JONAS MEYER.

135 Subscribed and sworn to before me, this 6th day of April, 1882.

[SEAL.] EDW'D CHATTIN,
Commissioner for Nevada, San Francisco, California.

(Endorsed:) "Approved. Field, J. May 19, 1882. Filed May 31, 1882. Chas. F. Bicknell, clerk supreme court of Nevada."

STATE OF NEVADA, *ss:*

I, Chas. F. Bicknell, clerk of the supreme court of said State of Nevada, do hereby certify the foregoing to be a true and correct copy of the original "bond" in cause of the Richmond Mining Company of Nevada, pl'ff in error, *v.* E. H. Rose *et al.*, def'ts in error, on file in my office.

In testimony whereof, I have hereunto set my hand and the seal of said supreme court, this 28th day of June, A. D. 1882.

[SEAL.] CHAS. F. BICKNELL, *Clerk.*

[Endorsed:] No. —. In Supreme Court of the United States. The Richmond Mining Company of Nevada, pltf in error, *vs.* E. H. Rose *et al.*, def'ts in error. Cert. copy "bond." Filed ——, 188–. ——, clerk.

Endorsed on cover: Nevada supreme court. No. 248. The Richmond Mining Company of Nevada, plaintiff in error, *vs.* E. H. Rose, J. W. Hixon, George W. Merrill, and Selden Hetzell. Filed 2nd August, 1882.

114-576

IN THE

SUPREME COURT OF THE UNITED STATES.

THE RICHMOND MINING COMPANY OF NEVADA,
Plaintiff in Error,

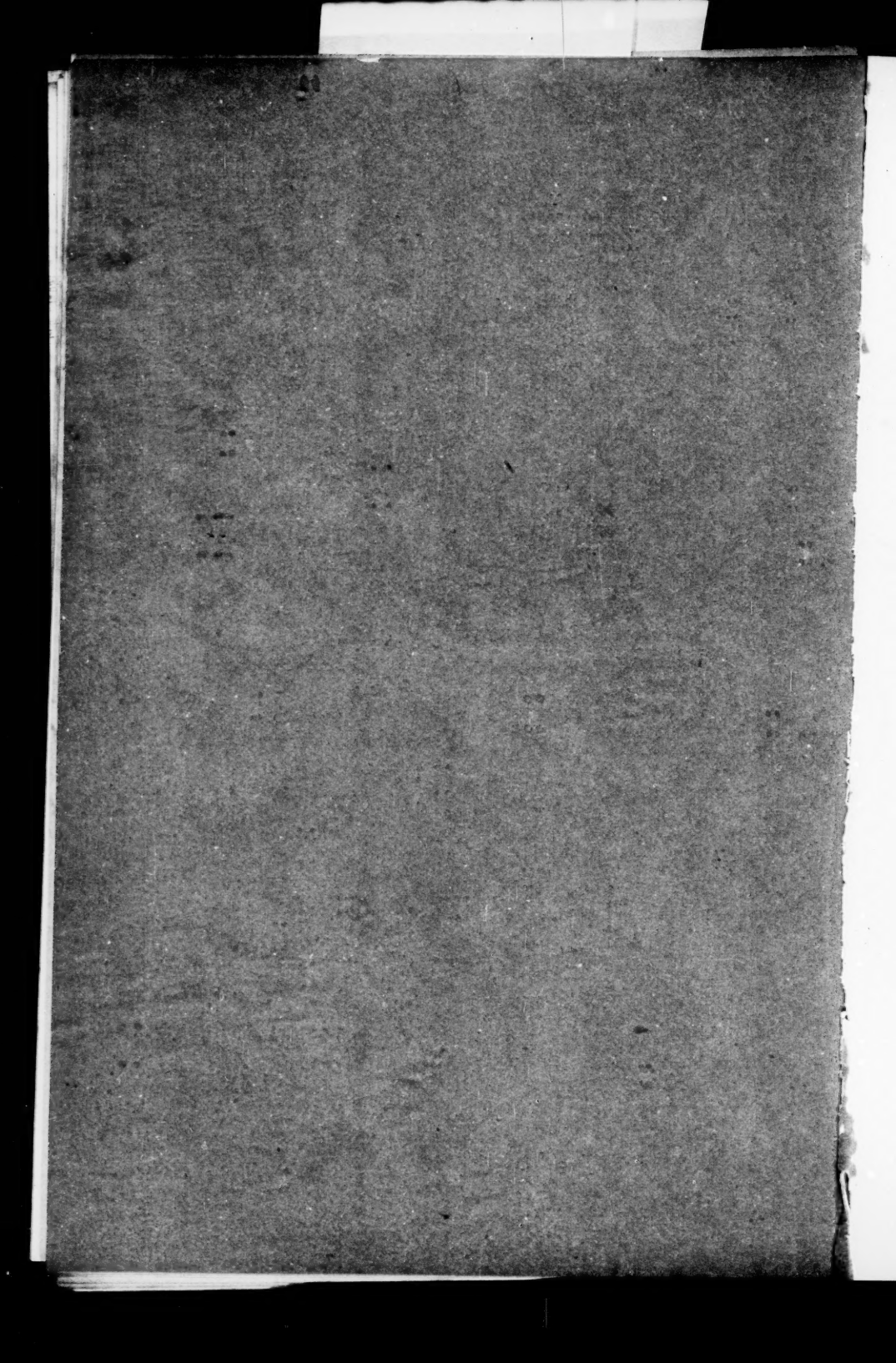
vs.

E. H. ROSE, J. W. HIXON, SELDEN HETZEL, AND G. W. MERRILL, *Defendants in Error.*

Error to the Supreme Court of the State of Nevada.

THOS. WREN,
Counsel for Plaintiff in Error.

R. O. POLKINHORN & SON, PRINTERS.



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Error to the Supreme Court of the State of Nevada.

STATEMENT OF FACTS.

This action was originally commenced in the District Court of the Sixth Judicial District, State of Nevada, to determine the right to the possession of a parcel of mining ground, a part of the public lands at the time this action was commenced, but conveyed to plaintiff in error by patents from the United States while it was pending. Defendants in error, plaintiffs below, claim title under a location described in the complaint as 800 feet long and 200 wide, known as the Uncle Sam. Plaintiff in error, defendant below, claims title under patents to the Tip Top, St. George and Victoria claims. The relative position of these claims and of the Uncle Sam are shown on diagram D, Transcript p. 22.

A jury having been specially waived, the case was tried by the Court. The Court filed special findings. The judgment of the District Court was in favor of the defendants in error for all that portion of the lode in controversy lying between the quartzite foot wall and the shale hanging wall to the northwest of a line designated on diagrams Exhibit H and Exhibit A, as line K L coincident with the northwesterly end line of the Victoria claim extended from the quartzite foot wall to the shale hanging wall of the lode, and in favor of the plaintiff in error for all that portion lying between the end lines of the Victoria claim extended from the quartzite to the shale; or, in other words, all of that portion lying southeasterly of the line K L.

From this judgment the defendants in error appealed to the Supreme Court of Nevada.

The statement on appeal only contained the pleadings, opinion of the court, findings and judgment.

The Supreme Court reversed the judgment of the District Court and directed that court to enter a judgment in favor of the defendants in error for all that portion of the mining ground in controversy lying westerly of the westerly end line of the Tip Top claim, designated by the line A C on the diagram (annexed to and made part of the opinion,) Exhibit A, transcript, p. 65, and in favor of the plaintiff in error for all that portion of the lode easterly of said line.

On the 25th day of April, 1882, judgment was entered in the District Court in accordance with the direction of the Supreme Court.

The plaintiff in error being dissatisfied with this judgment brings the case to this court for review.

"The mining ground in controversy is situated on Ruby Hill, in the Eureka mining district, Eureka county, and State of Nevada. Along and through this hill for a distance slightly exceeding a mile, and extending in a northwesterly and southeasterly direction is a zone of limestone,

in which at different places through its length mineral is found. Underlying this zone on the southerly side is a foot-wall of quartzite, which foot-wall has a general dip to the northeast. Overhanging it on the northerly side is a hanging wall of shale. This zone of limestone is a vein or lode of rock in place bearing gold, silver, lead, and other valuable minerals."

Finding Second, transcript, p. 19.

The lode is several hundred feet in width at the point at which the mining ground in controversy is situated.

On the 14th day of January, 1872, E. H. Rose and J. W. Hixon and one Louis Milton located the Uncle Sam, and in due time recorded their notice of location. They marked the boundaries of the claim before the St. George claim of the plaintiff in error was located.

Several years prior to the location of the Uncle Sam the lode had been discovered, and a large number of mining claims had been located upon it, and at the time the Uncle Sam was located Rose knew that these locations had been made, and that work was being prosecuted upon them. But at the time the Uncle Sam was located it was not known or believed that the zone of limestone on which these claims were located was one lode or zone, and at the time the Uncle Sam was located the locators believed there was no other valid existing location upon the ground included in the surface boundaries of the Uncle Sam location.

Sixth Finding, transcript, p. 20.

The Uncle Sam location was made in part upon the Tip Top location. The Tip Top location had been made prior to the location of the Uncle Sam, and work was being prosecuted thereon at the time the Uncle Sam was located, and Rose knew of the Tip Top location, and that work was

being prosecuted thereon when the Uncle Sam was located, but did not know that the Tip Top and Uncle Sam were on the same lode. There was no surface conflict between the two claims.

Diagram Exhibit D; transcript, p. 22; sixth and seventh finding, transcript, p. 20.

The identical ground located as the Uncle Sam had been located by Phillips and others on the 23d day of September, 1871, about four months prior to the location of the Uncle Sam, and work enough was done upon the location by the locators to hold it under the mining laws for one year.

Eighth Finding, transcript, p. 20.

This claim was abandoned prior to the location of the Uncle Sam.

There had been $466 expended in labor upon the Uncle Sam claim from the date of its location up to January 1st, 1877, including $136 expended in building a cabin upon the claim to live in, and the amount required by law to "hold" the claim had been expended upon it annually at the time of the trial of this case.

A patent was issued by the United States to the plaintiff in error for the Tip Top, conveying 600 linear feet of the lode and 300 feet in width of the surface, on the 30th day of April, 1874. The end lines of the Tip Top, as patented, extended from the quartzite to the shale, embraces 150 linear feet of the Uncle Sam.

Diagrams, Exhibits D and B; transcript, pp. 22 and 48.

In the District Court and in the Supreme Court it was conceded that the plaintiff in error, by virtue of the Tip Top patent, had the better title to all that portion of the

mining ground in controversy lying southeasterly of the northwesterly end line of the Tip Top, extended from the quartzite to the shale, as designated by the line A C on Diagram Exhibit B; transcript, p. 48.

The court found that the northwesterly end line of the Tip Top was eleven or twelve feet southeasterly of the line described in the patent. This finding had the effect, under the decision of the Supreme Court, of depriving plaintiff in error of eleven or twelve feet of the mining ground in controversy, described in the Tip Top patent, and awarding it to defendants in error.

Finding Eleventh, transcript, p. 22.

The St. George was located on the 20th day of March, 1873, a few days over fourteen months after the Uncle Sam was located.

Finding Thirteenth, transcript, p. 21.

The St. George is ~~only~~ and 15 fifteen hundred feet in length and two hundred feet in width, and only embraces a very small portion of the Uncle Sam, as the boundaries were marked and as shown by the diagram filed with and made part of the protest of Rose and Hixon, and none of the work on the Uncle Sam was embraced by the St. George location.

Exhibit F, transcript, p. 30.

The end lines of the St. George extended from quartzite to shale embraces all of the mining ground in controversy.

On the 1st day of August, 1870, plaintiff in error applied for a patent to the St. George.

Finding Thirteenth, transcript, p. 21.

On the 2d day of March, 1872, Milton conveyed his interest in the Uncle Sam to E. H. Rose.

Twentieth Finding, p. 23.

On the 29th day of September, 1873, Rose and Hixon filed a protest against the issuance of a patent to plaintiff in error for that portion of the St. George shown by diagram D, to be in conflict with the Uncle Sam.

Finding Fourteenth, transcript, p. 21; and transcript, p. 29 to 32, inclusive.

On the 20th day of October, 1873, Rose and Hixon conveyed 200 feet of the Uncle Sam to Merrill and Hetzel.

Twentieth Finding, transcript, p. 23.

Upon the 21st day of October, 1873, defendants in error, Rose, Hixon, Hetzel, and Merrill, filed the complaint in this action, but did not pay the docket fee, nor any other fees, and no fees were paid by them until August, 1874. On the 3d day of November, 1873, thirty-six days after the complaint was filed, and forty-four after the protest was filed, the clerk of the District Court advanced the docket fee and paid it to the County Treasurer.

Finding Fifteenth, transcript, p. 21.

No fees were paid by any of the successors in interest of the defendants in error until 1881.

Finding Fifteenth, transcript, p. 21.

On the 1st day of November, 1873, thirty-three days after the protest was filed, the plaintiff in error filed a general demurrer, and on the 26th day of the same month, nearly sixty days after the protest was filed, defendants in error filed its answer.

Thereafter the cause was placed upon the calendar, but was not tried for the reason that negotiations were pending for a settlement of the controversy, and defendants in error believed it would be amicably settled.

Finding 22d, transcript, p. 23.

At the March Term of the Court, 1874, the case was continued upon motion of counsel for plaintiff in error, and thereafter the cause was not placed upon the calendar and no proceedings were had in relation thereto for six years, or until March, 1880.

Finding 24th, transcript, p. 23.

In September, 1876, two years and six months after the cause had been last placed upon the calendar, plaintiff in error presented to the Land Officers at Eureka, a certificate of the clerk of the court, showing that the cause had not been placed upon the calendar, and that no proceedings had been had therein since the March Term of the Court, 1884, and offered to pay for the land, and asked leave to make final entry thereof. That thereupon the Land Office did decide that defendants had not prosecuted the cause with due diligence, and that plaintiff in error was entitled to make final entry and payment for the land and receive a patent therefor. And the register of the local land office forthwith transmitted all of the papers relating to the application and adverse claim to the Commissioner of the General Land Office. The Commissioner approved the ruling of the local land officers and directed them to notify the defendants in error that they would have sixty days within which to appeal from the decision of the Secretary of the Interior. Defendants in error were notified as directed, but they did not appeal and made no motion and took no steps in relation to the case. Subsequently the Commissioner of the General Land Office decided that the patent should issue, and on the 7th day of May, 1877, it was issued. Defendants in error were not notified that an application would be made to enter and purchase the land, and no motion was made by plaintiff in error to dismiss the action, for want of prosecution. At the time the application was made defendants in error believed that the plaintiff in error would

exclude the Uncle Sam claim from its application, and their attorneys believed the case would be settled.

Finding 25th, transcript, pp. 23, 24.

From the date of the discovery and location of the St. George the plaintiff in error has been actually in possession of the lode as described in the patent, and has expended upon that portion in conflict with the Uncle Sam the sum of not less than $60,000.

Finding 26th, transcript, p. 24.

On the 18th day of October, 1878, plaintiff in error applied for a patent to the Victoria mining claim. No protest was filed against this application by any one, and on the 28th day of February, 1880, the patent was issued for fifteen hundred linear feet of the lode and two hundred feet in width. The Victoria was located subsequent to the location of the uncle Sam.

Finding 19th, transcript, p. 22, and transcript, p. 40.

The end lines of the Victoria extended from quartzite to shale, embraces nearly all of the mining ground in controversy.

On the 30th day of September, 1878, defendants in error sold and conveyed all of their interest in the Uncle Sam to the Uncle Sam Mining Company, a California corporation, and on the day of April the Uncle Sam Company sold and conveyed to the Albion Consolidated Mining Company all of its interest in the Uncle Sam. This action is prosecuted in the name of the defendants in error for the benefit of the Albion Co. It does not appear from the findings whether the Albion Co. is a corporation or not.

Assignment of Errors.

The plaintiffs in error assign the following errors of the Supreme Court of the State of Nevada, upon which it relies for a reversal of the judgment in this case; that is to say:

I.

The Supreme Court erred in reversing the judgment of the District Court, and in directing said court to enter a judgment for the plaintiffs in said court "for all that portion of the mineral lode in controversy westerly of the westerly end line of the Tip Top claim, designated by the line A C on the diagrams," for the following reasons:

1. It appears from the facts found by the court that the plaintiffs below were not at any time the owners of nor seized nor possessed of the mining ground in controversy.

2. It appears from the findings that possession under patents from the United States by the defendant below of the mining ground in controversy created a presumption of right and ownership in the said defendant not overcome by any facts contained in the findings.

3. It appears from the findings that the Uncle Sam location was invalid and void.

4. It appears from the findings that the protest of Rose and Hixon against the application of the defendant below for a patent to the St. George was insufficient, and that it should have been disregarded by the United States land officers.

5. It appears from the findings that the plaintiffs below did not commence this action within thirty days after filing the protest.

6. It appears from the findings that the defendant below was the owner of and in possession of all of the mining ground in controversy under patents from the United States.

7. It appears from the findings that defendant below had been the owner of and in the actual and exclusive possession of all of the mining ground in controversy under patents from the United States for over four years prior to the trial of this action.

8. It appears from the findings that at the time the defendant below filed its amended and supplemental answer setting up its title acquired after this action was commenced by patents from the United States to the mining ground in controversy, all right of action in either plaintiffs, or their successors in interest, if any they had, growing out of the issuance of said patents was barred by the statute of limitations.

9. It appears from the findings that more than three years had elapsed from the time of the issuance of the St. George patent to defendant below and the time defendant below filed its amended and supplemental answer setting up title acquired after this action was commenced, and, therefore, plaintiffs below were not entitled to show that the patent was improperly issued to defendant below, when of right it should have been issued to plaintiffs below.

10. It appears from the findings that if plaintiffs below ever had any rights, legal or equitable, they lost them by laches.

II.

The Supreme Court erred in the following particulars:

1. In holding that the Uncle Sam was a good and valid location.

2. In holding that the protest filed by Rose and Hixon was sufficient?

3. In holding that the defendants in error commenced this action within thirty days after filing their protest.

4. In holding that by failing to file a plea in abatement or moving to dismiss this action, defendant below waived

the failure of plaintiffs below to commence the action in time, and thereby lost its right to a patent.

5. In holding that plaintiffs below did not waive their adverse claim by failing to commence this action within thirty days after filing their protest.

6. In holding that defendant below lost any right or rights by failing to file a plea of abatement or by not moving to dismiss this case.

7. In holding that defendant lost any right or rights by failing to call the attention of the land officers to the fact that the protest was insufficient or that the suit had not been commenced in time.

8. In holding that the land officers had no jurisdiction to decide that plaintiffs below had waived their adverse claim.

9. In holding that the decision of the land officers, though right in fact, should not be upheld if they gave a wrong reason for it.

10. In holding that the filing of the protest by Rose and Hixon operated as a reservation of the mining ground in controversy from sale.

11. In holding that the St. George patent was void.

12. In holding that the Victoria patent was void.

POINTS.

The Court erred in holding that the St. George Patent was void.

"The patent is not void upon its face;" "that is to say, it is not seen to be invalid, either when read in the light of existing law or by reason of what the court must take judicial notice of." "It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing. It is

properly countersigned, and the seal of the General Land Office is attached to it." It was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made for their sale."

Smelting Co., vs. *Kemp*, 104 U. S., 636.

The Supreme Court of Nevada, however, held that the protest of Rose and Hixon against the St. George application operated as a reservation of the land from sale; that this reservation continued, notwithstanding the decision of the land officers that the defendants in error had waived their adverse claim.

That the land officers had no jurisdiction to pass upon the question of "reasonable diligence," and that, therefore, the patent was issued while the land it embraced was reserved from sale and "without authority of law."

It seems to me that this decision is based upon a misapprehension of the real question presented for consideration by the decision of the land officers. What did they decide? I quote from the finding—"The said Immel and Works, as register and receiver aforesaid, did rule and decide that the said plaintiff herein had not prosecuted this action with due diligence to a final determination or to any determination whatever, and *that this defendant was entitled to make final entry and payment for the said mining ground and premises and to receive a patent therefor.*

Finding Twenty-fifth, transcript, pp. 23, 24.

This was tantamount to a decision that denfendants in error had waived their adverse claim by a failure to prosecute this action with due diligence. Or, in other words, that the defendants in error had waived their adverse claim and stating the ground upon which the decision was based.

If this view is correct, the real question for consideration is the jurisdiction of the land officers to decide that an adverse claim has been waived, and not their jurisdiction to pass upon the question of "reasonable diligence."

My contention is that the land officers have exclusive jurisdiction to pass upon questions of waiver in every form in which they can be presented.

Congress has confided to the Land Department the execution of the laws which regulate the sale of the public lands. In disposing of public mineral lands, however, jurisdiction to "determine the right of possession" between adverse claimants is taken away from the Land Department and the question is referred to the courts. In other respects the jurisdiction of the Land Department over the proceeding for their sale remains as full and complete as it is over the proceeding for the sale of any other character of land.

In the exercise of this jurisdiction it become their duty to pass upon a great variety of questions relating to protests against applications for patents.

The law provides that an adverse claimant must file his adverse claim "during the period of publication of notice," and that "it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim."

Revised Stat. U. S., sec. 2326.

It also provides that: "It shall be the duty of the adverse claimant, within thirty days after filing his adverse claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim."

Revised Stat. U. S., Sec. 2326.

The law further provides: "That when an adverse claim is filed all proceedings except the publication of notice and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled, or decided by a court of competent jurisdiction, or the adverse claim waived.

Revised Stat. U. S., Sec. 2326.

Under these provisions, after protest, an adverse claim may be disposed of in several ways. It may be settled, or the adverse claim may be waived by any one of several modes. If the protestant fails to commence proceedings to "determine the right to the possession" within thirty days after filing his protest he waives his adverse claim. If, after suit is commenced, "he fails to prosecute it with reasonable diligence to a final determination" he waives it. And there seems no doubt that he may waive it expressly at any time after the protest is filed.

Proceedings having been stayed in the Land Department by protest, in case of a settlement or waiver of the adverse claim, the applicant must establish to the satisfaction of the land officers in some way the settlement or waiver in order to proceed with his application. And the land officers must, in the regular course of proceeding for the sale of the land, pass upon the fact of settlement or waiver when called upon to do so, or the case cannot proceed to patent.

In this case the land officers were called upon to pass upon the question of waiver; having been called upon, they proceeded, as they were bound to do, to ascertain whether the defendants in error had waived their adverse claim or not, and having decided and having jurisdiction to decide that they had their determination, is conclusive against collateral attack.

Smelting Co. v. *Kemp*, 104 U. S., 636.

If in deciding that defendants in error had waived their adverse claim, and in issuing the patent the land officers "took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives," their action may be reviewed in a proper proceeding for that purpose, but the St. George patent is not void on that account and cannot be collaterally attacked.

Smelting Co. v. *Kemp*, 104 U. S., 636.

I contend, however, that upon the proposition that the land officers did not have jurisdiction to decide that defendants in error had waived their adverse claim, the court below was manifestly in error.

The mining act of 1872 confers no jurisdiction upon the courts for any purpose. It simply provides, in cases of protest, that an adverse claimant must "commence proceedings in a court of *competent jurisdiction* to determine the question of the right of possession." It assumes that the courts already possess the requisite jurisdiction "to determine the question of the right of possession" to public mineral lands. It does not in terms deprive the land officers of jurisdiction to decide every question that may arise in the course of proceedings to acquire title to public mineral lands, except a controversy as to "the right to the possession," as between adverse claimants. But it is contended that inasmuch as courts have jurisdiction to dismiss cases pending before them "for want of prosecution," it must have been the intention of Congress to invest them with exclusive jurisdiction to decide in all cases, whether an action has been prosecuted with reasonable diligence or not.

It may be the better practice, possibly, for the land officers, in most cases pending before them, not to pass upon that question; but there is nothing in the law to indicate that it was the intention of Congress to take the jurisdiction

away from the land officers, and it is by no means certain that it would be good policy to do so. In the absence of such an intention clearly appearing, it will be presumed that Congress intended to continue the jurisdiction to pass upon that question where it has vested the jurisdiction to pass upon all other questions relating to the sale of the public lands, with the one exception, in the Land Department.

The Uncle Sam Location was Invalid and Void ab Initio.

The claim was located on the 14th of January, 1872. At that time the mining act of 1866 was in force. That act provided: "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode."

Mining Act, July 26, 1866. 14 Stat., 251.

The mining laws of the Eureka Mining District, in force at the time the Uncle Sam was located, were equally explicit in regard to the number of feet upon a lode each locator should be entitled to locate and hold. They provided that: "Each claim shall consist of two hundred feet on the ledge, but claimants may consolidate their claims by locating in a common name, so that in the aggregate no more ground is claimed than two hundred feet for each name. Claimants may hold one hundred feet on each side of their ledge for mining and building purposes, but shall not be entitled to any ledge within said distance by virtue thereof.

Finding Third, transcript, p. 19.

Mining Laws Eureka District, Sec. 3, transcript, p. 27

The court finds that these laws were in force in the district at the time the Uncle Sam was located.

Finding 4th, transcript, pp. 19, 20.

The Uncle Sam location contained eight hundred feet. There were only three locators, each entitled under the law to locate two hundred feet and no more, neither being the discoverer of the lode.

The court finds that the lode had been discovered several years prior to the location of the Uncle Sam, and a number of locations made upon it, and that Rose, one of the locators of the Uncle Sam, knew of these prior locations and that work was being prosecuted thereon at the time the Uncle Sam was located. Between one of these prior locations, the Tip Top and the Uncle Sam, there was a conflict of about one hundred and fifty feet, the Uncle Sam lapping to that extent upon the Tip Top.

Findings 6th and 7th, transcript, p. 20, and Diagram Exhibit D, transcript, p. 22.

The identical land embraced in the Uncle Sam location had been discovered and located prior to the location of the Uncle Sam, by other parties, who had done work enough upon their claim within sixty days after locating it to hold it under the mining laws of the United States and the Eureka mining district for one year.

Findings 8th and 12th, transcript, pp. 20 and 21.

It appears, then, that the Uncle Sam was located, not only in violation of the laws of the United States, but also in violation of the mining laws of the district. The locators of the Uncle Sam, having located more ground than they were entitled to, their claim was absolutely void. A valid location can only be made as prescribed by law.

"The right of location upon the mineral lands of the United States is a privilege granted by Congress, but

> it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail."
>
> *Bell* vs. *Meagher*, 104 U. S., 279.

In *Smelting Co.* vs. *Kemp*, 104 U. S., 641, the court uses the following language:

> "Something more, however, than an apparent contradiction in the terms of a patent is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid either when read in the light of existing law or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by statute from sale or otherwise appropriated *or that the patent is for an unauthorized amount.*"

Does a claim to mining ground before patent stand upon a different and higher plane than a patent? If a patent be void because it is issued for an *unauthorized amount*, why is not a location or claim for an *unauthorized amount* equally void. What reason is there for holding the one void and the other not.

If the claim was void the defendants in error were not able to aver in this action that their rights had been injuriously affected. They did not connect themselves with the original source of title, and could not attach the St. George patent in any form of action.

If the claim was not wholly invalid it was certainly invalid to the extent of two hundred feet. The Supreme Court of Nevada seem to have adopted this view. If invalid to the extent of two hundred feet the plaintiffs below could not, in any view of the case, be entitled to a judgment for more than six hundred feet of the lode. Judgment was ordered, however, for all that part of the lode

lying westerly of the western end line of the Tip Top, designated upon the diagram, Exhibit A, transcript, p. 64, as line A C—about six hundred and fifty feet. This was clearly error for which the case should be reversed.

If the court should hold that the Uncle Sam was not wholly void, but only void to the extent of two hundred feet, and hold against plaintiff in error upon all other points, it would become necessary to determine from what part of the claim the two hundred feet in excess of the amount the locations were entitled to locate should be taken.

Will defendants in error be allowed to select, or will plaintiff in error be allowed to select? Will the court hold that this question must be determined upon a rule of law applicable in all cases of a similar kind ~~upon a rule of law~~, or will it be held that this and all other cases similar shall each be determined by the facts and circumstances surrounding it and according to equity.

In this case the question is of great importance. By reference to Diagram D, page 22 of the transcript, it will be seen that the surface conflict between the Uncle Sam and St. George, as the Uncle Sam was described in the protest and complaint herein, was limited. The court finds that the defendant in error had been in the actual possession of the St. George, as described in the patent, from the date of its location, and had expended on and under that portion in conflict with the Uncle Sam, $60,000, but that none of the excavations made by the plaintiff in error came in conflict with those made by defendants in error or their successors in interest.

Finding 26th, transcript, pp. 24, 25.

The court also finds that the locators of the Uncle Sam and their grantees had been in possession of the claim from the time of its location, to the extent of annually sinking a shaft thereon, and at times occupying a cabin thereon, and

in performing labor of the value of $466, including the cost of building a cabin thereon, $136, from the ———, 186–, up to January 1st, 1877—nearly four years.

Finding 6th, transcript, p. 20.

And that the locators of the Uncle Sam and their successors in interest did the amount of work annually required by law to hold the claim, but that none of the work was done on that portion of the claim embraced within the surface limits of the St. George patent.

Finding Eleventh, transcript, p. 21.

It is evident from these findings that the $60,000 spent by the plaintiff in error was upon the southeasterly portion of the Uncle Sam, and that the work, such as it was, that was done by the locators of the Uncle Sam was upon the northwesterly portion of the claim, and not upon the portion developed by the plaintiff in error; and by reference to Diagram D, transcript, p. 22, it will be seen that the ore chambers of the plaintiff in error extend to the northwest of the Tip Top line, extended from wall to wall of the lode, generally less than fifty feet. This part of the claim, for obvious reasons, the plaintiff in error would select, if compelled to make any selection, and for the same reasons the defendants in error would like to select it.

The Supreme Court of Nevada, in passing upon this question, dwelt at length upon the hardships that would result from holding a claim void upon this ground. A conclusive answer to all that is said by the court upon that branch of the case is, that the question is not a new one in Nevada. Twelve years since, one of the district courts of the State held that the "Kentuck" claim at Pioche was void upon that ground. But, notwithstanding that decision, claim-holders have guarded themselves so carefully against inconvenience and hardship on that account, that, so far as I am aware or can recollect, the question has not

been raised in Eureka for twelve years in any case except this, and in the whole State of Nevada the question, I believe, has never found its way to the Supreme Court except in this case. Any possible danger or hardship to result from an enforcement of the law is purely imaginary.

The court erred in holding that the patent of Rose and Hixon against the St. George application was sufficient.

It was insufficient to operate to stay proceedings in the Land Office.

It is not out of place here to notice the imperfect character of the Uncle Sam claim generally. The notice of location reads as follows:

> Uncle Sam. The undersigned claim eight hundred (800) feet on this ledge, lode or mineral deposit, this monument and notice being the center of the claim, as the lead may run. This shall be known as the 'Uncle Sam' mine, and is situated on the northwesterly slope of Ruby Hill, about one thousand feet (1,000) northwesterly from the Tip Top mine, Eureka Mining District, Lander County, Nev., January 14, 1872. J. W. Hixon, E. H. Rose, Louis Milton."
>
> Transcript, p. 32.

It will be observed that the notice does not claim in words two hundred feet for a "discovery claim." The claim is situated "about one thousand feet (1,000) northwesterly from the Tip Top Mine," as described in the notice, and did not conflict with either the St. George or Victoria. But as it is claimed at the present time, it is not only not situated about one thousand feet northwesterly of the Tip Top, but laps on the Tip Top Mine about one hundred and fifty feet.

Exhibit D, transcript, p. 22.

The notice does not describe the claim by reference to any natural object or permanent monuments, or in any

other way, so that it can be identified, except by reference to the Tip Top.

The court finds that the boundaries of the claim were marked by its locators before the St. George was located.

Finding 5th, transcript, p. 20.

But fails to find the extent of the claim as the boundaries were marked, or the character of the boundaries marked. We are left to infer, in the absence of a finding of the fact, that the boundaries as marked were coincident with the exterior lines of the claim as described in the protest and in the complaint herein. The claim as described in the protest and complaint is not the claim described in the notice of location. At the time the Uncle Sam was located, the mining law of 1866 was still in force. That law did not limit the width of claims. That was left to be regulated by the miners. The mining laws of the Eureka district in relation to the width of claims at the time the Uncle Sam was located reads as follows:

> "Each claim shall consist of 200 feet on the ledge, but claimants may consolidate their claims by locating in a common name so that, in the aggregate, no more ground is claimed than 200 feet for each name. Claimants may hold 100 feet on each side of their ledge for mining and building purposes, but shall not be entitled to any ledge within said distance by virtue thereof."
>
> Laws Eureka mining district, sec. 3, transcript, p. 27.

If this notice of location was not void for reasons already stated, the locators of the Uncle Sam, under the laws of the United States and the mining laws of the Eureka mining district, at the time it was located, and their notice of location, were entitled to the entire width of the lode, and, at least, six hundred feet in length along the lode. But the boundaries of the claim, as they were marked, as must be inferred from the findings and as described in the patent and

in the complaint herein only embrace two hundred feet in width of the lode.

The Spreme Court of Nevada held, however, that defendants in error were entitled, under the notice of location, to all that portion of the lode lying westerly of the line A C, about six hundred and fifty feet in length along the lode and the entire width of the lode, and ordered judgment accordingly. It is, therefore, evident that the court did not regard the marking of boundaries and the description in the protest and complaint as in any way limiting the claim as originally located. This, as I understand the decisions in California and Nevada, was in accordance with the rule adopted in those States in reference to mining claims located prior to the passage of the mining law of 1872.

English vs. *Johnson*, 17 Cal., 107

Now the mining law of 1872, in relation to protests, provides that: "Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, *and shall show the nature, boundaries, and extent of such adverse claim.*"

Revised Stat. U. S., Sec. 2325.

And the regulations of the land department require the adverse claimant to "fully set forth the nature and extent of the interference or conflict."

Sickles' Land Laws and Decisions, p. 537, Instruction 48.

And they further require that: "In order that the *boundaries* and *extent* of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict."

Sickles' Mining Laws and Decisions, p. 537, Instruction, 49.

The regulations also provide that: "When an adverse claim is filed as aforesaid the register or receiver will indorse upon the same the precise date of filing and preserve a record of the date of notification issued thereon, and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court or the adverse claim waived or withdrawn."

Sickles' Land Laws and Decisions, p. 538, Instruction, 51.

These requirements in the law and in the regulations of the Land Department are of great importance, and at least a substantial compliance with them is absolutely necessary for the information and protection of applicants for patents to public mineral lands and for the information and guidance of the land officers.

That Rose and Hixon did not show even approximately by their protest the boundaries and extent of the "Uncle Sam," nor the extent of the "interference or conflict" between it and the St. George as the law and regulations require, will be seen at a glance.

Diagram D, transcript, p. 22.

The protest filed was insufficient to stay proceedings in the Land Office upon the St. George application.

The provisions of the Statute and the regulations of the Land Department upon this subject are clear and explicit. If these provisions of the Statute and the regulations of the Land Department may be disregarded at pleasure by protestants, there seems little reason why they may not disregard any of the provisions of the Statute or regulations of the Department in relation to protests.

The proceedings in the Land Office upon which the St. George patent was issued were introduced in evidence against the objection of counsel for defendants in error. I still adhere to the opinion that the objection was good, and that they were not admissable in this case. But if they are entitled to consideration and are considered, if they show facts and circumstances tending to defeat a recovery herein, the defendant in error is entitled to their benefit.

> "When the plaintiffs seek to set aside the legal title because they have the superior equity, it is consistent with the principles of the court to rebut this equity by any circumstances which may impair it."
>
> *Miller et al.* vs. *Keen*, 7 Wheat., 1.

In this case, I have no doubt, that all of the trouble and expensive litigation that has grown out of this controversy would have been avoided if Rose and Hixon had shown correctly in their protest the nature, boundaries, and extent of their claim. As it was described in the protest and in the complaint the defendant in error was led to believe that there was nothing but a surface conflict, of no importance, between the Uncle Sam and St George, and that the surface conflict between the Uncle Sam and Victoria was too trifling to be noticed, and doubtless so thought the owners of the Uncle Sam at the time application was made for a patent to the Victoria, or a protest would have been filed against the application.

The court erred in holding that the defendants in error commenced this action within thirty days after Rose and Hixon protested.

An action is commenced under the Nevada Practice Act by filing a complaint and issuing a summons thereon. The voluntary appearance of a defendant waives the issuance of

a summons. The findings are silent in relation to the date at which this action was commenced. They show, however, that the protest was filed on the 29th day of September, 1873, and that the complaint was filed on the 21st day of October of the same year. They are also silent as to the issuance of a summons, but it appears from the record that no summons was issued. The judgment roll is made up under the following provision of the Statute of Nevada:

> "Immediately after entering the judgment, the clerk shall attach together and file the following papers, which shall constitute the judgment roll: First, in case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with the memorandum indorsed on the complaint that the default of the defendant in not answering was entered, and a copy of the judgment; second, in all other cases, the summons, pleadings, and a copy of the judgment and any orders relating to a change of parties."
>
> Compiled Laws of Nevada, Vol. 1, p. 353, Sec. 1266.

> "A copy of the statement [on appeal] shall be annexed to a copy of the judgment roll, if the appeal be from a judgment; if the appeal be from an order, to a copy of such order."
>
> Compiled Laws of Nevada, Vol. 1, p. 393, Sec. 1397.

It was the duty of the clerk, under these provisions of the law, to attach the summons, if one had been issued, to the other papers forming the judgment roll, and the judgment roll forms part of the record on appeal. It is to be presumed that the clerk did his duty, and therefore, in the absence of the summons in the record, that none was ever issued. In Nevada, a plaintiff is permitted to file his complaint, and afterwards to issue summons thereon at any time within one year. The following is the provision of the statute:

"The clerk shall endorse on the complaint the day, month, and year the same is filed, and at any time within one year after the filing of the same the plaintiff may cause to be issued a summons thereon." * * *

Compiled Laws of Nevada, vol. 1, p. 279, sec. 1086.

The Statute further provides "that after filing of the complaint a defendant in the action may appear, answer or demur whether the summons has been issued or not, and such appearance, answer, or demurrer shall be deemed a waiver of summons."

Compiled Laws of Nevada, vol. 1, sec. 1085.

It also provides that "a voluntary appearance of a defendant shall be equivalent to personal service of the summons on him."

Compiled Laws of Nevada, vol. 1, section 1098.

The court finds that defendant filed a demurrer, and it appears from the file marks on the copy of the demurrer in the record that it was filed on the first day of November, 1873—three days after the thirty days had expired within which the law required the defendants in error to commence suit after the protest was filed.

Finding 15th, transcript, p. 22.

The voluntary appearance of the plaintiff in error had the same effect as the issuance of summons would have had had one been issued. If a summons had been issued on the 1st of November, that would have been the date upon which the action would have been deemed to have been commenced, and that is the date at which it must be deemed to have been commenced by the voluntary appearance of the plaintiff in error.

Upon the failure of the defendants in error to commence proceedings under their protest within thirty days after it

was filed, they waived their "adverse claim" and plaintiff in error became at once entitled to make the necessary proofs, enter and pay for the land, and receive a patent therefor. Subsequently the plaintiff in error applied to the land officers to be permitted to make the necessary proof, and to enter and pay for the land, and for a patent. Upon this application the land officers decided that plaintiff in error was entitled to a patent upon making the proper proofs and entering and paying for the land. The plaintiff having a right to the patent, it can make no possible difference, so far as equity and justice are concerned, whether the land officers gave the right reason for their decision or not.

> "A wrong reason for a judgment, which is in itself correct, will not vitiate or affect it."
>
> *Scott* vs. *Haines*, 4 Nev., 426.

The Court erred in holding that the Victoria Patent was void.

Like the St. George, the patent is valid upon its face. "It is seen to be valid, either when read in the light of existing law or by reason of what the court must take judicial notice of."

> "The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the land department supervised the proceeding. It bears the signature of the President, or rather of the officer authorized by law to place the President's signature to it, which is the same thing: it is properly countersigned, and the seal of the General Land Office is attached to it"

It was "issued in a case where the department had jurisdiction to act; that is to say, in a case where the land

belonged to the United States and provision had been made for its sale."

But the Supreme Court of Nevada held that at the time the patent was issued the land it embraces was reserved from sale by virtue of the protest of Rose and Hixon against the St. George application.

The error the Supreme Court of Nevada fell into in relation to the Victoria patent was in assuming that an application for a patent to public mineral lands was for the *lode* and *not for the land.*

Prior to the passage of the law of 1866, under the regulations of the miners the lode was located, and incident thereto the locator was allowed to locate surface ground on each side of his lode for working purposes.

The mining act of 1866 followed closely the customs and regulations of the miners theretofore existing in this respect. It provides "that whenever any person or association of persons claim a *vein* or *lode* of quartz or other rock in place, * * * it shall and may be lawful for said claimant * * * to file in the local land office a diagram of the same so extended, laterally or otherwise, as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor." * *

Act of July 26th, 1866, 14 Stat., 251.

Prior to the passage of the Mining Act of 1872 the courts of California had held that all that was necessary, in order to make a valid location of a mineral-bearing lode or vein, was to post a notice upon it, or within reasonable proximity to it, and in some way define its extent. In this respect they were followed by the courts of Nevada. The extent of the claim was usually defined in the notice of location, as it is in the Uncle Sam notice. Upon posting such a notice upon or near the lode or vein, and complying with the law in other respects, the locator was entitled to follow his

lode in any direction and wherever it might run. This led to an immense amount of expensive litigation between the owners of adjoining claims. In the single county of White Pine, in Nevada, alone, it is not an extravagant estimate to say that a quarter of a million of dollars was spent in litigation growing entirely out of this rule. A demand for a change in the law in this respect became almost universal.

The mining act of 1872 was passed in part to correct this evil. It requires a locator to locate a surface claim and to mark its boundaries upon the ground so that they can be readily traced, making the end lines parallel. As incident to his surface claim it gave to the locators the "exclusive right of possession and enjoyment of all the surface enclosed within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations. *Provided*, That their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges."

Revised Stats. U. S., sec's 2320, 2321, 3322.

Under these provisions there could no longer be any doubt as to the rights of locators upon the surface or the extent of their right to the lodes or veins included in their surface claims.

Under the regulations and customs of miners, before any law had been passed to regulate the occupation of the public mineral lands, and under the mining act of 1866 locators were allowed to follow their lodes upon their dip. The

dip of a lode is and must be at right angles with its strike. Now, it is never an easy matter to determine the exact strike of a lode for the entire length of a claim. It is always more or less uncertain, and it follows that the rights of locators in following their lodes down on their dip were equally uncertain. This uncertainty was entirely done away with by the provision of the act of 1872, above cited, confining locators within the end lines of their locations extended, in following their lode or lodes down into the earth. These provisions of the law made all things certain where before all was uncertainty. It reduced the chances for disputes amongst the miners and owners of mining claims mainly to questions of priority of location, compliance with the mining laws in reference to the marking of boundaries, record of notices of location, work upon claims, and abandonment. It eliminated from mining controversies that most vexatious of all questions—the identity of lodes.

That portion of the act of 1872 in relation to patents to the public mineral lands introduces equal certainty in the proceedings to procure them. It requires the applicant for a patent to file a plat of his surface claim, showing accurately the boundaries of the claim. He must distinctly mark the boundaries by monuments on the ground. He must post a copy of the plat, together with a notice of his application, in a conspicuous place on the land, and file a copy of his notice in the land office. The Register of the land office in which the application is filed is required to publish a notice in a newspaper published nearest the claim for sixty days, that the application has been made, and post a copy of the notice in his office for the same period.

Revised Statutes, Secs. 23–25.

The plat of the claim posted on the land and in the land office, and the marking of boundaries distinctly "by monuments on the ground," are intended to give notice to

the world of the precise point of location and extent of the surface claim, in order that adverse claimants, if any there be, may have an opportunity to assert their rights and to limit the rights of the applicant to the surface claimed and the rights incident thereto, and they are ample for these purposes.

The course that an adverse claimant must pursue, in order to preserve his rights, is equally clear and certain under the act of 1872. Elsewhere I have pointed out the requirements of the law and the regulations of the land department in relation to protests, and will not repeat them here.

The Victoria was located after the passage of the act of 1872. It embraces fifteen hundred feet of surface ground along the lode and two hundred feet in width. It does not cover any portion of the surface embraced in the St. George application. There was an extensive surface conflict between it and the Uncle Sam location.

The plaintiff in error in compliance with the law marked its boundaries distinctly by monuments upon the ground, filed a plat of the claim and notice in the land office and posted them upon the land. The register of the land office published notice of the application for sixty days in a newspaper published nearest to the claim. All parties interested had ample notice of the application and what was claimed under it.

The Uncle Sam Company, at that time the owner of the Uncle Sam claim, notwithstanding all this publicity, and the fact that it embraced surface ground claimed by the Uncle Sam, stood idly by for some reason and did not file an adverse claim against the application.

Now, opposing counsel to excuse this negligence or carelessness contend that a protest to the Victoria application was unnecessary, that the St. George application covered the

same lode, and that the protest of Rose and Hixon operated to reserve the *lode* from sale.

The law does not authorize an application for a patent for a lode. The law of 1872 provides: That a patent for any *land* claimed and located for valuable deposits may be obtained in the following manner."

Revised Stat. U. S., sec. 2325.

Under the law of 1866 application for a patent to a lode, vein or ledge could be made, but all that is changed by the law of 1872.

If a protest is filed it must be against the application for a patent to the land, and not to the lode.

If a protest operates to reserve anything from sale, which I do not admit, it is the land embraced in the application against which it is filed, and not some other parcel of land.

The doctrine contended for by opposing counsel and adopted by the Supreme Court of Nevada would return us to the old time uncertainty in reference to what the owners of a mining location really claim or are entitled to.

The owners of the Uncle Sam having failed to file a protest against the Victoria application, the defendants in error have lost all right, if any they ever had, to that portion of the lode covered by the Victoria patent.

> "When two parties are contending for the same property, the first in time in the commencement of proceedings for the acquisition of the title, where the same are regularly followed up, is deemed to be the first in right. But this principle has been qualified in its application to patents of mining ground by provisions in the act of 1872, for the settlement of adverse claims before the issue of the patent. Under that act when one is seeking a patent for his mining location, and gives proper notice of the fact as the law prescribed, any other claimant of an unpatented location objecting to the patent of the claim either on account of its ex-

tent or form, or because of asserted prior location, must come forward with his objections and present them or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be deriving title from other sources, such, perhaps, as might arise from a subsequent location of school warrants, or a subsequent purchase from the State, as in the case of *Heydenfeldt* vs *Daney Gold Mining Company*, reported in the third of otto the doctrine cannot be applied so as to cut off the rights of the earlier patentee under a later location, when no opposition to that location was made under the statute. The silence of the first locator is under the statute a waiver of his priority."

Eureka Co. vs. *Richmond Co.*, 4 Sawyer, 318.

It is conceded by both parties that the patent to the lode if valid conveys the entire lode from quartzite foot wall to shale hanging wall. In other words, the patent conveys to plaintiff in error all that portion of the lode lying between the end lines of the patent extended from the foot to the hanging wall. That embraces all that portion of the land in controversy lying southwesterly of the line K. L.

Diagram Exhibit A, transcript, p. 6.

Counsel for defendants in error contend that upon the findings a decree should be made converting the plaintiff in error into a trustee, and to compel it to convey the legal title to the defendants in error.

The defendants in error have no interest in the land in controversy. But if they were still the owners of the Uncle Sam claim they would not be entitled to such a decree, and the Albion Consolidated Mining Company, for whose benefit

the action is prosecuted, is not entitled to such a decree for several reasons:

1st. If the theory of counsel for defendants in error and of the Supreme Court of Nevada be correct, that the St. George and Victoria patents were issued "without authority of law" and are, therefore, absolutely void, this Court will leave the defendants in error to acquire title through the Land Department.

If the patents are absolutely void, that fact may be shown in any form of action. They are worthless as evidence of title. They are worthless as a defence in this action. If the defendants in error on the trial established a better right to the possession of the land than the plaintiff in error, independent of the patents, and the patents are absolutely void, they were entitled to a judgment establishing their right to the possession of the land, and that was in fact the judgment entered in this case, and there the jurisdiction of the court below ceased. The law is too plain to admit of doubt. If defendants in error desire the legal title their only course to procure it is plain. They must "file a certified copy of the judgment roll with the register of the land office together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made on the claim, and the description required in other cases, and must pay to the receiver five dollars per acre for their claim together with the proper fees, whereupon the whole proceeding and the judgment roll will be certified by the register to the Commissioner of the General Land Office, and a patent will issue thereon for the claim." * * *

Revised Stats. U. S. sec. 2325.

The decisions of this court on this subject establish—

"1st. That the judiciary will not interfere by mandamus injunction or *otherwise* with the officers of the

Land Department in the exercise of their duties while the matter remains in their hands for decision."
Johnson v. *Towsley*, 13 Wall., 72.

2d. The Uncle Sam location was void *ab. initio.*

3d. If the Uncle Sam location was not wholly void it was invalid to the extent of two hundred feet, and the decree asked is for about six hundred and fifty feet of the lode instead of six hundred.

4th. The protest of Rose and Hixon against the St. George application was insufficient, and Rose and Hixon lost all their rights, if any they had under the Uncle Sam location, by filing a protest that was insufficient, and their successors in interest stand in no better position.

5th. The defendants in error did not commence this action within thirty days after Rose and Hixon filed their protest, and they thereby waived their adverse claim.

6. They failed to prosecute this action with reasonable diligence, and thereby waived their adverse claim.

7. They are not entitled to the decree in this proceeding, if at all.

8th. They are not entitled to the decree upon the pleading, if at all.

9th. The findings do not warrant the decree.

It does not appear from the findings that the defendants in error are citizens of the United States.

It does not appear from the findings that the Albion Consolidated Mining Company is a corporation or a citizen of the United States.

It does not appear from the findings that defendants in error had expended five hundred dollars in labor upon the Uncle Sam at the time this suit was commenced, nor at the time the patent to the St. George was issued.

It does not appear from the findings that they have done all, or offered to do all, that the law requires to entitle them

to a patent, and it does not appear that the Albion Consolidated Mining Company has done all, or offered to do all, that the law requires to entitle it to a patent.

This action was commenced under section 1674 of the compiled laws of Nevada. The Supreme Court of Nevada so held in this case.

Upon the pleadings, it is uncertain whether this is an action at law or proceeding in equity. Upon the facts, however, in connection with the pleadings, there can be no doubt that it was an action at law. This being an action at law, neither the St. George nor Victoria patents can be attacked, unless they are absolutely void, and no relief can be given in this action unless the patents are absolutely void upon their face or were issued "without authority of law."

Counsel for defendants in error do not contend that they are void upon their face, and I submit that it is equally clear that they were not issued "without authority of law." Upon the pleadings in this action, the patents cannot be attacked, even if we admit, for the sake of the argument, that this is an equitable case. In an equitable proceeding, the pleadings must give notice of the latent defects of which the party means to avail himself. In this case the pleadings do not fulfil that requirement.

Polk's Lessees vs. *Wendell*, 9 Cranch, 99.

If this is an action to quiet title, the legal title being in the plaintiff in error, defendants in error cannot recover. If the defendants in error had an equitable title, they should have filed a bill to have the plaintiff declared a trustee.

Burton vs. *Le Roy*, 5 Sawyer, 521.

The defendants in error cannot place themselves in a position to entitle them to the decree asked, in any case.

If they are entitled to relief, their only remedy is by proceeding in the name of the United States to set the patents aside.

I respectfully suggest that the judgment of the Supreme Court of Nevada should be reversed.

THOS. WREN,
Counsel for Plaintiff in Error.

1143-76

Office Supreme Court U. S.
FILED
MAR 28 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1884.

THE RICHMOND MINING COMPANY OF NEVADA.

vs.

E. H. ROSE, *et al.*

No. 248.

In Error to the Supreme Court of the State of Nevada.

BRIEF FOR PLAINTIFF IN ERROR.

WALTER H. SMITH,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

October Term, 1884.

THE RICHMOND MINING COMPANY OF NEVADA.

vs.

E. H. ROSE, *et al.*

No. 248.

In Error to the Supreme Court of the State of Nevada.

STATEMENT OF THE CASE.

This action was brought in the District Court of the County of Eureka and State of Nevada, by E. H. Rose *et al.*, defendants in error, against the Richmond Mining Company of Nevada, plaintiff in error, to settle conflicting claims to certain mining ground. The District Court gave judgment for the defendants below, the Richmond Mining Company. Rose and others appealed the case to the Supreme Court of Nevada and that court reversed the judgment of the District Court.

This writ of error is now prosecuted to reverse the judgment of the Supreme Court of Nevada.

The facts were found by the judge of the District Court a jury having been waived by the parties, and are fully set out in the record and must be the basis upon which the judgment of this court will depend. They are as follows:

The premises in dispute are situated upon Ruby Hill, in the Eureka Mining District, Eureka County, Nevada. Along and through the hill, for a distance slightly exceeding a mile is a zone of limestone in which mineral is found in different places throughout its length. Underlying this zone, on the southerly side is a well defined, unbroken foot wall of quartzite, having a general dip to the northeast, and on the northerly side is a hanging wall of shale. This zone of limestone is a vein or lode of rock in place bearing gold, silver, lead and other valuable minerals.

The miners of this Eureka District adopted certain rules and regulations for their district, and thereafter, on the 14th of January, A. D. 1872, E. H. Rose, J. W. Hixon and Louis Milton located a mining claim of 800 linear feet on this zone or lode, 200 feet of which was for a discovery claim. It was called the Uncle Sam mining claim. This location was duly recorded and its boundaries marked. This zone or lode had been discovered for several years before the Uncle Sam location, and a large number of mining claims had been located upon it before the Uncle Sam location, all of which was well known to E. H. Rose, one of the locators of the Uncle Sam, at the time he made the location.

It had been the custom of the larger portion of the miners in the Eureka District, both before and after the location of the Uncle Sam, to include 200 feet for a discovery claim, and, at the time of the location of the Uncle Sam, it was not known that the belt or zone of limestone, running through Ruby Hill, constituted but one lode or zone, and the locators of the Uncle Sam made their location in good faith and in accordance with the custom and usage of the majority of the miners in that district.

The Uncle Sam adjoined the Tip Top location, which had been located and worked before the Uncle Sam, and was being worked at the time of the Uncle Sam location, all of which was well known to the said Rose. The Tip Top was upon the same lode as the Uncle Sam; but this fact was unknown to Rose at the time he made his location. There was no surface conflict between the two claims.

Prior to the location of the Uncle Sam, and on the 23d of September, 1871, Phillips and Haskell had made a location called the Phillips, upon the identical premises included in the Uncle Sam location, and had done sufficient work on the same to hold it for a year, but had abandoned it before the location of the Uncle Sam, all of which was well known to Rose at the time he located the Uncle Sam.

Prior to the location of the Phillips, Rose had discovered some ore at the point where the notice of location of the Phillips was posted, and had done work at that point.

Sufficient work had been done on the Uncle Sam to hold it up to the time of the trial of this case in the District Court, but no portion of this work had been done within the surface limits of the St. George location, which last named location was made on the 20th of March, 1873.

The Richmond Mining Company, on the 1st day of August, 1873, made an application in the proper land office at Eureka, for a patent for the said St. George Mining Claim.

On the 29th of September, 1873, and within the sixty days of publication of the St. George application, the said E. H. Rose and J. W. Hixon, filed a protest in said land office. This protest is copied into the findings. (Record, 29–34.)

On the 21st of October, 1873, the said E. H. Rose, J. W. Hixon, and G. W. Merrill, and Seldon Hitzel, filed the original complaint in this action in the office of the clerk of the court, but they did not pay the docket fee of five dollars, nor any other fee, to the clerk of the court at the time

of filing the complaint, nor at any other time until August, 1874; but the clerk of the court did himself advance and pay the said five dollar docket fee to the treasurer of Eureka county on the 3d day of November, 1873.

The judge did not find the fact, that no summons had ever issued in this action; but the transcript of the record shows that none was ever issued. (Record, p. 2.)

The judge did find that the defendants below filed a demurrer in said action and subsequently an answer, and did not at any time move the court to dismiss the action or file a plea in abatement. (Record, p. 21.)

On the 7th of May, 1877, the Government of the United States issued a patent to the Richmond Mining Company for the St. George claim.

The fact that the docket fee had not been paid by the plaintiff, when the action was commenced, was not called to the attention of the land department, at the time the St. George patent was issued, and the patent was not issued upon the ground that no suit had been commenced or that such docket fee had not been paid. No notice was filed in the Land Office at Eureka, Nevada, that no suit had been commenced. (Record, p. 21.)

On the 30th of April, 1874, a patent was issued for the Tip Top claim.

The relative positions of the Uncle Sam, the St. George, the Tip Top, and of another claim, called the Victoria (which will be hereafter fully explained), are shown on the plat marked Exhibit H, and found at page 22 of the Record.

The judge found that the line "A. C." on said diagram is the northerly end line of the Tip Top; and that the Tip Top, the Uncle Sam, the St. George, and the Victoria are all located on the same vein or lode; and that the line "K. L." on said Exhibit H, which extends through the northwest end of the Victoria, from the quartzite foot wall to

the hanging wall, is the true dividing line between the plaintiffs and defendant.

On the 7th of May, 1877, a patent was issued to the Richmond Company, for the St. George claim.

After the issuance of the St. George patent, the Richmond Company, on the 18th of October, 1878, made application for a patent for the Victoria mining claim, shown on said Exhibit H, which claim had been located subsequent to the Uncle Sam location. A patent issued to the Richmond Company for the Victoria on the 28th of February, 1880. There was no adverse claim filed against the application of the Victoria for patent.

The plaintiffs below had acquired the interest of the original locators in the Uncle Sam before the commencement of this suit.

The Richmond Company filed its answer in this case on the 26th of November, 1873.

The case was placed on the trial calendar according to the usual practice of the court, but it was not tried because negotiations were pending for a settlement, and the plaintiffs believed that the Richmond Company would abandon its claim to that portion of the Uncle Sam west of the west line of the Tip Top.

At the March Term, 1874, the cause was continued on the motion of defendants' counsel, and after that date the cause was not placed on the calendar, nor was anything done in it until the March Term, 1880.

Sometime in the month of September, 1876, the Richmond Company made application to the register and receiver at the land office at Eureka, to accept payment for the St. George lode, and for leave to make final entry of the same, and produced a certificate of the clerk of the court to the effect that this action had not been placed on the calendar, nor had any proceedings been had therein from the March Term, 1874, up to that time, which certifi-

cate was strictly true; and thereupon the register and receiver held that the suit had not been prosecuted with due diligence to a final determination, or any determination whatever, and that the Richmond Company was entitled to make payment and final entry, which was accordingly done.

The register and receiver thereupon transmitted the application, adverse claim, and all the papers to the Commissioner of the General Land Office, and he approved and affirmed their action, and directed them to notify Rose and his co-plaintiffs of his decision, and that they would have sixty days within which to appeal from his decision to the Secretary of the Interior. This notice was given in writing and actually received by Rose and his co-plaintiffs; but they did not appeal the case or take any steps whatever for that purpose. The Commissioner afterwards held and decided that the Richmond Company was entitled to its patent for the St. George, and it was issued on the 7th of May, 1877.

The Richmond Company did not notify Rose and his co-plaintiffs of their intention to make application for payment and final entry at the Eureka Land Office, nor did it make application to the court to dismiss the action for want of prosecution. The application and payment were made when the plaintiffs believed, from the representations made to them by the officers and agents of the Richmond Company, that it would exclude from its application for patent all of the Uncle Sam location west of the west end line of the Tip Top claim.

No notice was given to Rose and others of the decision of the local officers, and they had no opportunity of appealing from that decision to the Commissioner of the General Land Office.

In April, 1880, the cause was put on the trial calender on motion of the plaintiffs.

The Richmond Company had been in the actual possession of the St. George lode, as in the patent described, from the date of its discovery and location and up to the time of the trial, and had been engaged in mining therein and thereunder, and had expended in that portion of the same which was in conflict with the Uncle Sam at least $60,000 in gold coin, in sinking winzes, running drifts, tunnels and levels at a great depth below the surface of the earth. None of the excavations made by either party came in conflict with any of those made by the other.

The mining ground, in controversy in this case, lies between planes drawn vertically down through the end lines of the Victoria patented claim, extended from the foot wall to the hanging wall of the lode.

The above findings are all that are deemed material to be called to the attention of the court. They will be found on pages 19 to 25 inclusive, of the record.

Upon them the District Court held that the patent to the St. George mining claim was void, and that the patent to the Victoria was valid; and that the adverse claim of the plaintiffs was good to all that portion of the premises lying northwest of the line K. L., and decreed accordingly.

The plaintiffs appealed to the Supreme Court of Nevada, and that Court held that both patents—the one to the St. George and the other to the Victoria—were void, and gave the premises in controversy to the plaintiffs below.

This writ of error is prosecuted, by the Richmond Company, to reverse that judgment.

Assignment of Errors.

1. *The Supreme Court of Nevada erred in holding that the locators of the Uncle Sam were entitled to 200 feet along the lode as a discovery claim.*

2. *The court erred in holding that this suit was commenced within the thirty days after the filing of the adverse claim.*

3. *The court erred in holding that the St. George patent was void.*

4. *The court erred in holding that the Victoria patent was void.*

5. *The court erred in rendering judgment for the plaintiffs, when, by the laws of the land, its judgment should have been in favor of the defendant.*

Argument.

1. *The locators of the Uncle Sam were not entitled to a discovery claim of 200 feet.*

Their location was made on the 14th of January, 1872, and is governed by the Act of July 26, 1866, 14 Stat. 251. The 6th section provided that no location should exceed 200 feet for each locator.

It gave to each locator "two hundred feet in length along the vein," and "an additional claim for discovery to the discoverer of the lode."

The statute speaks in clear and distinct terms. It gives the additional claim to the "*discoverer of the lode.*"

If Rose were the "discoverer of the lode," then he was entitled to the 200 feet as his reward for making the discovery. But the case finds that he did not discover *the lode.* That had been discovered and was well known long before his location. The case, however, finds that it was the custom and usage of the larger portion of the miners in the Eureka district to include 200 feet for discovery, and it was not then known that the Ruby Hill belt or zone of limestone constituted but one lode. Waiving the question, which naturally arises as to the validity of a custom or usage such as the case finds, it is clear, that no custom or usage can

change the plain terms of the statute. They must control. Custom and usage can prevail only when they are not inconsistent with the statute. The statute so declares in express words. Its first section provides that mining claims shall be "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same *may not be in conflict with the laws of the United States.*" The statute says one thing. This custom another.

The statute says the discoverer of a lode shall be entitled to an additional claim. The custom says you need not be the discoverer of a lode, but you may make a new location on a lode that has already been discovered, and you shall have an additional claim therefor. I submit that such a custom cannot change the law.

But I deny that Rose was the discoverer of the lode in the Uncle Sam location, even upon the theory that it was an independent lode. Phillips and Haskell had made the discovery before he did. The case finds that they had located a mining claim on the 21st of September, 1871, upon the *identical premises* afterwards included in the Uncle Sam, and that *Rose knew it* when he made his location, January 14, 1872. (Eight and tenth findings, Record, 20, 21.)

The making of a mining location presupposes the discovery of a vein or lode. A location, under the act of 1866, must be made "along the vein."

Phillips and Haskell could not have made a location of a mining claim "along the vein," as required by that act, without first having discovered the vein.

The Revised Statutes make this clear. In sec. 2320, it is provided that—

> "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

In *Golden Terra Mining Co.* vs. *Mahler*, 4, Mining Reports, 397, Moody, Judge, said:

> "I am of opinion and so hold, that the spirit and intent of the Act of Congress is to require, as a condition precedent to a location of a mining claim, that a discovery of a vein, bearing valuable minerals, shall first be made within the limits of such location."

To the same effect is the language of Sawyer, Judge, in *Jupiter Mining Co.* vs. *Bodie Consolidated*, 4 Mining Reports, 422.

It follows, from these considerations, that the lode had been discovered by Phillips and Haskell before the pretended discovery of Rose, and that he was not the discoverer of the lode in controversy, and, therefore, was not entitled to the 200 feet discovery claim.

If he were not, what are the consequences of its having been included in his location? Did it render the location, as to the excess, voidable or void, and if void, how can advantage be taken of that fact?

I shall claim that it made his location void as to the excess, and that the excess should be taken from the end of his claim now in controversy.

There were three locators in this case. They were entitled to 200 feet each. That would make 600 feet.

They were entitled to no more. The law gave them no more. It they took more, they took what the law did not give them, and in so far as they acted without authority of law, their act must be void. An attempt to appropriate the public lands, either in large or small quantities, without law, is a void act.

In *Jupiter Mining Co.* vs. *Bodie*, *supra*, Sawyer, J., held that a location of more than 50 feet on each side of the lode, in a district where the miners' rules limited the location to 50 feet, *was void as to the excess*. He said, in charging the jury—

"In view of all the circumstances appearing in the evidence, it is for you to determine whether the 50 feet limitation had fallen into disuse, or was really *in force* at the time of the location in question. If if was *not* in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of 300 feet on each side of the vein. If the limitation was in force, then it was *void* as to the excess over 50 feet on each side of the vein, but valid to the extent of 50 feet and *no more*."

So, in the present case, the excess of 200 feet was void, and Rose was a wrong doer, and he cannot take advantage of his own wrong. It does not lie in his mouth to elect where the excess shall be taken. It is much more consonant with reason and justice that the party that has done no wrong should have the election, and if he does not make it the court will make it for him, and where there is a controversy and conflict of claims, as to one end and none as to the other, the court should and will take it from the end that is in controversy.

2. *The suit upon the adverse claim was not commenced in time.*

The Revised Statutes, sec. 2326, provide as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of pos-

> session, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim."

The application for patent for the St. George was made on the 1st day of August, 1873. The period of publication was sixty days. Before the expiration of the sixty days, the adverse claim was filed, to wit: on the 29th of September, 1873. The statute required the suit to be commenced "*within* thirty days *after* filing his claim." The day of filing the adverse claim should be excluded. Excluding the 29th of September and we have one day left in September and twenty-nine days in October *within* which the suit must be commenced.

The 29th would be the last day. Now was this suit commenced on or before the 29th of October, 1873? That is the question. What is the commencement of a suit? That depends upon the law of the forum in which the suit is commenced. The law is different in different States. It is generally fixed by express provision of statute. So much depends upon the point of time at which a suit may be said to be commenced, that it has been deemed wise to fix the precise time by statute. This was done by the legislature of Nevada.

Sec. 22, of the Civil Practice Act, Comp. Laws, 1085, is in these words:

> "Civil actions, in the district courts, shall be commenced by the filing of a complaint with the clerk of the court, and the issuance of a summons thereon; provided that, after the filing of the complaint a defendant in the action may appear, answer or demur, whether the summons has been issued or not, and such appearance, answer or demurrer, shall be deemed a waiver of summons."

Nothing can be more clear. There is no room for construction. The words are free from all doubt. The suit

shall be deemed commenced by the "filing of a complaint with the clerk of the court *and* the issuance of a summons thereon."

The complaint was filed in this case on the 21st of October, 1873, but no summons was ever issued thereon. (Record, p. 2.) There was neither summons nor demurrer nor answer on or before October 29th, the last day on which suit could be brought. The demurrer was filed November 1st, 1873. (Record, p. 2.) That was on the third day *after* the 30 days had fully expired. The filing of the demurrer was an entry of the appearance of the defendant *as of that date*. It was a waiver of summons from and after that date. It was as though summons had then issued and been served.

This view is strengthened by the provisions of Sec. 1098, compiled laws, which is as follows:

> "From the time of the service of the summons, in a civil action, the court shall be deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him."

Suppose summons had actually issued on the 1st of November, and been served on that date, could it be contended, for a moment, that suit had been commenced, within the meaning of the Nevada statute, before that date? Every lawyer, it seems to me, must answer no.

If suit was not commenced *within* the 30 days, the land department was not required to stay its proceedings for patent. It was the rule of the department not to stay them when the suit was commenced after the 30 days. This was decided as early as September 26, 1872. Copp Mining Decisions, 145.

The land department acquired its jurisdiction over the parties and the subject matter by the application for patent, and it rightfully retained its jurisdiction until the issuance of patent, unless its proceedings were stayed by authority of law. That must be conceded by every one. The only case in which its proceedings could be stayed was when an adverse claim had been filed within the period of publication *and* suit commenced within the 30 days after such filing. Suppose the adverse claim was not filed within the period of publication? Suppose it was filed six months after the expiration of that period?

The land officers were not required to pay any attention to it, and never did.

So if the suit were brought six months or six days after the 30 days had expired, the land officers were not required to, and never did, pay any attention to the suit, but always proceeded with the application for patent as though no suit had been brought.

The land officers are the tribunal provided by law to dispose of and pass title to the mineral and other public lands of the United States. Their decisions have the force and effect of other judicial tribunals.

Said the Chief Justice, in *Vance* vs. *Burbank*, 101 U. S., 519:

> "The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other tribunals are."

Having once acquired jurisdiction they cannot be ousted of it, except in strict compliance with some law.

It is claimed that they were ousted of their jurisdiction to issue the patent which they did issue for the St. George by the filing of the adverse claim and the bringing of the suit upon it.

The St. George patent was given in evidence by the Richmond Company. The plaintiff sought to avoid the force and effect of the patent by giving in evidence the proceedings that took place in the land office and in the court, upon and after the filing of the adverse claim. Waiving the question now whether it was competent for them to give in evidence those proceedings at all, in view of the decision of this court in *Smelting Co.* vs. *Kemp*, 104 U. S., 636, and conceding, for the sake of the argument, that it might be done, it was incumbent upon the plaintiff to show *affirmatively* on their part that they had filed their adverse claim within the period of publication, and *commenced* their suit *within* thirty days of such filing. They were required to show *both* of those things before they could attack the patent. If they failed to show either they failed to show that the land officers had acted without authority in issuing the patent. If they had shown that the adverse claim was in fact filed after the period of publication, they would have failed in their attack upon the patent. So, if they failed to show that the suit had been commenced within the 30 days. In making out the fact that suit had been commenced they were required to make out that every thing had been done within the 30 days which the statute required to be done in order to commence a suit, and, inasmuch as the statute required the issuance of a summons in order to commence a suit they were required to show that a summons had been issued within the 30 days. This they did not and could not do, and they therefore failed to lay the predicate for an attack upon the patent.

In the view I take of this case it was wholly immaterial whether the land officers knew that no summons had issued or not. The question is not what they knew or did not know, but was there such a state of fact in existence at that time as justified them in proceeding with the application. If there were, whether they knew it or not, or gave a wrong

reason for a correct decision or not, *the patentee* is entitled to show the real facts and to show that the decision and proceedings of the officers were correct. And for this purpose he may show that the decision was right, and that the facts then in existence justified it, no matter whether the officers gave a good or bad reason for it, or gave no reason at all, but simply made the decision.

Again, this suit was not commenced within the 30 days, because the docket fee of five dollars was not paid by the plaintiffs within the 30 days. This will appear from an examination of sections 2,766 and 2,767 of the compiled laws of Nevada, which are in these words:

> "Sec. 2,766, Sec. 1. At the time of the commencement of every civil action, or other proceeding, in the several district courts of this State, the plaintiff shall pay the clerk of the court in which said action shall be commenced, the sum of five dollars, in gold or silver coin, except as herein otherwise provided. At the commencement of any proceeding in said district courts for the purpose of procuring an appointment of administrators upon the estate of any deceased person, the party instituting such proceedings shall pay the clerk of said court the sum of three dollars in gold or silver coin.
>
> "Sec. 2,767, Sec. 2. Whenever any appeal shall be brought in a civil action or proceeding, from the judgment or decision of the court of a Justice of the Peace or other tribunal inferior to the district court, to the district court, the party appealing shall, before the return to said appeal shall be allowed to be filed in the appellate court, pay the clerk of such appellate court the sum of two dollars in gold or silver coin, which said several fees above provided for shall be known as court fees. *And no such action shall be deemed commenced, proceedings instituted, or appeal perfected, until the said fees shall be paid as aforesaid.*"

It is thus seen that the suit could not have been commenced on or before October 29th, 1873, unless the docket

fee was paid by that time. The language is, "no suit shall be deemed commenced . . . . . *until* the said fee shall be paid."

This fee was not paid by the plaintiffs until August, 1874. (Fifteenth finding, Record, p. 21.)

It was paid by the clerk on the 3d of November, 1873. (Record, p. 21.)

That was five days after thirty days had expired. Surely payment by the clerk puts the plaintiffs in no better position than they would have been had they paid it themselves; and if they had paid it on the 3d of November it would have been five days too late.

The Supreme Court of Nevada seems to have felt the necessity of in some way getting rid of this point, and they did it in a very summary manner.

They said:

> "They" (the findings) "show, however, that defendant regularly appeared and filed a demurrer and answer to plaintiffs' complaint, and *did not at any time move to dismiss the action, or file a plea in abatement.*"

But they did not demur until the 1st of November, 1873, after the 30 days had more than expired, and did not answer until the 26th of November.

The filing of the demurrer had the effect of entering their appearance in the case. That was a waiver of the issuance and service of a summons. The fact that they did not move to dismiss or plead in abatement, on the ground that the docket fee was not paid, shows that they thereby waived their objection to the *continuance* of the suit, after it had been begun, but they did not thereby waive any objection that they might have to the time when the suit might be deemed to have been commenced.

It certainly was commenced on the 3d of November, when the docket fee was paid.

It may have been, and in my opinion was, commenced on the 1st of November, when the demurrer was filed, for pleading a general demurrer was a waiver of all dilatory pleas.

The willingness of the Richmond Company to proceed with the suit, in the State court, under the State law, did not prevent it from making any valid objection that existed under the United States law. Under the State law the time of commencing the suit was an immaterial matter. *Under the United States statute it was of the highest importance.*

The failure of the company to make the objection, in the State court, by plea in abatement, that the suit had not been commenced prior to November 1st or 3d, did not prevent it from showing the true date of its commencement either in that court or elsewhere, whenever it became material to know the exact date of its commencement.

The Supreme Court of Nevada, therefore, erred in the ruling that it made on this question.

3. *The court erred in holding the St. George patent void.*

At the risk of some repetition, I will re-state the findings upon this point.

This claim was located subsequent to the Uncle Sam. The application for patent was filed on the 1st of August, 1873. The adverse claim was filed on the 29th of September, 1873. The complaint was filed on the 21st of October, 1873, but no summons was issued, or demurrer filed, or docket fee paid until after the expiration of thirty days from the filing of the adverse claim. The case was placed on the calendar according to the usual course, but it was not tried because negotiations were pending for a settlement, and the plaintiffs believed that the Richmond Company would abandon its claim to that portion of the Uncle Sam west of

the west line of the Tip Top. The cause was continued at the March Term, 1874, on the motion of counsel for the Richmond Company. After that the cause was dropped from the calendar and nothing done with it until the March Term, 1880.

In September, 1876, the Richmond Company applied to the register and receiver of the local office to accept payment for the St. George, and make final entry of the same, and it furnished the local officers with a certificate of the clerk of the court that the case had not been placed upon the calendar, nor had any proceedings been had therein since the March Term, 1874, and up to that time. It was conceded that this certificate was true in every respect. And, thereupon, the register and receiver held that the suit had not been prosecuted with due diligence, and allowed the final entry to be made.

The plaintiffs had no notice of the proceeding before the register and receiver, but the local officers transferred the entire proceedings to the Commissioner of the General Land Office, and he affirmed all that they had done, and caused notice to be given to the plaintiffs of that fact, and that they would be allowed 60 days in which to appeal to the Secretary of the Interior.

This notice the plaintiffs actually received, but they refused to appeal, and did not appeal.

The Commissioner decided to issue a patent for the St. George, and it was issued on the 7th of May, 1877.

The Richmond Company had been in the actual possession of the St. George lode, as the same was patented, from the date of its discovery and location, and had spent $60,000 in working the same below the surface.

Upon these findings the Supreme Court of Nevada held that the St. George patent was void.

In this connection, I call the attention of the court to what I have already said under the 2d assignment of error.

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In this connection, I call the attention of the court to what I have already said under the 2d assignment of error.

If the views there expressed are correct, they effectually dispose of the present question, and the patent, instead of being void, was legal and valid.

The court below held that the filing of the adverse claim and the bringing of the suit, in the manner in which it was brought, *ipso facto*, deprived the land officers of all further jurisdiction in the case, and that what they afterwards did was without jurisdiction and absolutely void.

In so doing, I think there was manifest error.

The land officers constitute a special tribunal to consider and decide all questions relating to the disposal of the public lands. Their decisions are like those of other judicial tribunals, and are to be given the same effect. This principle has been so often affirmed by this court that I feel reluctant to cite the cases, wherein it is declared, to wit:

Ballance vs. *Forsyth*, 24 How., 185;
Johnson vs. *Towsley*, 13 Wall., 72;
Vance vs. *Burbank*, 101 U. S., *supra*;
United States vs. *Schurz*, 102 U. S., 400;
Smelting Co. vs. *Keemp*, 104 U. S., 636;
Steel vs. *Smelting Co.*, 106 U. S., 447.

They have jurisdiction to dispose of mineral lands. They unquestionably had jurisdiction in the present case up to the time of the filing of the adverse claim, and the bringing of the suit.

After that their jurisdiction was not taken away, as I understand the statute. The proceeding was still pending before them. It was not ended; something remained to be done. The statute stayed the proceedings only on certain conditions. They were: 1. The filing of an adverse claim within the period of publication; 2. The making of the same upon oath; 3. Showing its nature, boundaries and extent; 4. Commencing suit upon it within 30 days from

the time of its filing; 5. Commencing such suit in some court of competent jurisdiction to determine the right of possession.

All these conditions were required before there could be any stay of proceedings.

The power to decide whether they had been complied with or not must rest in some tribunal, and it seems to me, that it must, from the necessity of the case, be in the land officers. They must decide whether the adverse claim was filed within the period of publication; whether it was made under oath; whether it showed the nature, extent and boundaries of the same; whether suit had been commenced within the 30 days, and whether it had been brought in a court of competent jurisdiction.

All of these questions, except the last, have often been raised before the land officers, and they have uniformly held that all of the above particulars must unite in favor of the adverse claim, or else it was rejected and the case proceeded to patent. It is clear, that up to this point, the land officers were the tribunal to decide them.

But something more was contemplated, after the suit was brought.

The proceedings were to be stayed "until the controversy shall have been settled, or decided by a court of competent jurisdiction, or the adverse claim waived." The statute evidently contemplated a possible compromise by the parties, and, as matter of fact, a great majority of adverse claims are filed for the purpose of compelling the the applicant for patent to buy out the adverse claimants, often, for no other reason than to avoid the delay incident to the trial of an adverse claim.

Now, suppose the controversy had been settled by the parties, who was to pass upon and determine that question?

Suppose the adverse claims were waived, in express terms, who was to determine that? Suppose a writing, purport-

ing to be a waiver of the adverse claim and signed by both parties to the suit, were produced in the land department, and it was alleged that one of the signatures was a forgery, who was to determine that? It is apparent that the land officers must do it. The statute never contemplated that such questions should be referred to the court. It contemplated action by the land officers, and they had jurisdiction to decide such questions.

They had the power to decide the question of due diligence in the prosecution of the suit. The statute expressly provided that a failure to bring the suit within the thirty days should be a waiver of the adverse claim, and it provided just as clearly that having commenced the suit and failed "to prosecute the same with reasonable diligence, to final judgment," should in, like manner, "be a waiver of his adverse claim."

This is its language:

> "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the right of possession, *and prosecute the same with reasonable diligence to final judyment; and a failure to do so shall be a waiver of his adverse claim.*"

It must be conceded that whenever there had been "a waiver," the land department could proceed to patent.

There was "a waiver" whenever the suit had not been commenced within time. That is clear. There was "a waiver" whenever the suit had been properly commenced, but was not prosecuted to final judgment with reasonable diligence. That is also clear.

Now, what tribunal should determine these questions? There must be some power somewhere to do that thing.

When there has been "a waiver" by reason of no suit having been brought, it cannot be in the court. In that

case, the power must be in the land department. It alone can determine whether there has been a waiver. Why must it not also determine whether there has been "a waiver" for want of due diligence in the prosecution of the suit? I can see no good reason. I insist that the question of waiver, and the whole question upon that subject, is by law submitted to the land department, and that its decision cannot be attacked collaterally.

I know that the practice in the Interior Department for a few years past, has been to allow that question to be disposed of by the court. That practice was first introduced by Secretary Chandler, who was not a lawyer, although he was a man of fine executive abilities. The practice has been occasionally, but not often, followed by his successors. That fact is entitled to some weight in the construction of the law now under consideration. It is somewhat persuasive, but not controlling.

United States vs. *Graham*, 110 U. S., 221.

My contention is, that the land department was required to put a construction upon this clause of the statute which related to reasonable diligence in the prosecution of the suit, and, if it placed an erroneous construction upon it, or gave undue effect to the facts, its decision was not void. It was voidable only. It was simply a question of waiver which it was within its jurisdiction to decide.

Suppose this adverse claim had been filed on the last day of the sixty days of publication, if, in estimating the period of publication the first day of publication were excluded, but one day too late if the first day were included? That would have raised a question of law about which the authorities are fearfully conflicting. They are numerous and highly respectable on both sides. This court has never determined it. In *Griffith* vs. *Bozart*, 18 How., 162, it was termed the *controversia, controversissima*.

Now suppose the Commissioner and Secretary had held that the first day of publication should be included and had rejected the adverse claim and proceeded to patent, but this court, on review of the question in this case, should finally hold that the first day of publication should be excluded, and therefore the Commissioner and the Secretary had erred in rejecting the adverse claim, would that render the patent void? Most assuredly not.

It would be voidable only, and could be attacked only in a direct proceeding for its correction, or annulment.

This court fully considered the effect of a patent and the right to attack it in the late case of *Smelting Company* vs. *Keemp*, 104 U. S., 636. It there held that the land officers were required to determine all questions of fact that necessarily arose in the case, and to determine whether all necessary antecedent acts had been performed, and that their decision was final and conclusive and could not be attacked collaterally or otherwise, except by a direct proceeding for correction or annulment.

Mr. Justice FIELD, in delivering the opinion of the court, said, in speaking of the officers of the land department:

> "In that respect they exercise a judicial function, and therefore it has been held in various instances by this court, that their judgment *as to matters of fact*, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction and annulment." . . . .
>
> "A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts,

goes so far that if, in any circumstances under existing law, a patent would be held valid, it will be presumed that such circumstances existed."

And in *Steel* vs. *Smelting Co.*, 106 U. S., 454, the same learned Justice said:

> "It" (the patent) "cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the Department. This can be accomplished only by regular judicial proceedings in the name of the Government for that special purpose."

In the light of these authorities I might, for the sake of the argument, concede that the land officers made a mistake of fact when they found that the case had not been prosecuted with due diligence, and yet claim, as I have done and do claim, that the patent could not be assailed or corrected in this suit.

But it will be urged on the other side that they made a mistake of law as well as of fact. Grant, for the sake of argument, that they did, and yet the same result will follow.

They had jurisdiction, and that drew after it the right to decide every question that could arise in the case, and it matters not whether one error or one hundred were committed, their judgment is voidable only.

In *Philadelphia and Trenton Railroad Company* vs. *Stimson*, 14 Peters, 458, Mr. Justice DANIEL, in delivering the opinion of the court, said:

> "The correct legal principle applicable to such proceedings is this: That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a su-

preme authority, and cannot be affected, nor the rights of persons dependent upon it be impaired by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this court, as in the cases of *Thompson* vs. *Tolme*, 2 Peters, 157; *The United States* vs. *Arredondo*, 6 Peters, 720; *Voorhees* vs. *The Bank of the United States*, 10 Peters, 473, and the *Philadelphia and Trenton Railroad Company* vs. *Stimson*, 13 Peters, 458."

And in *Cornett* vs. *Williams*, 20 Wall., 249, Mr. Justice SWAYNE, in delivering the opinion of the court, said:

"Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide, whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether upon the case as presented, affirmative or negative action is proper. The power to review and reverse the decision so made, is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot, and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is, that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things, and irreversible for error. In the absence of fraud, no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise."

In the United States vs. *Arredondo*, 6 Peters, 729, Mr. Justice DANIEL said:

"It is a universal principle, that, where power or jurisdiction is delegated to *any public officer*, or tribunal over a subject matter, and its exercise is confided to his or their discretion; the acts so done are binding, and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer, and fraud in the party. All other questions are settled by the decision made, or the act done by the tribunal or officer; whether executive, (1 Cr., 170–171,)—legislative, (4 Wh., 423; 2 Peters, 412; 4 Peters, 563)—judicial, (11 Mass., 227; 11 S. & R., 429, adopted in 2 Peters, 167–168)—or special, (20 J. R., 739–740; 2 Dow, P. Cas., 521, &c.,) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

And whether it was voidable is matter of grave doubt. It certainly was not if the court improperly admitted the transcript of the proceedings anterior to patent. And that question depends upon the character of this suit, whether it is at law or in equity. If at law, it is absolutely certain, that, under the settled rulings of this court, the patent could not be attacked. If it is an equitable proceeding, then there is more doubt.

I claim that the proceeding was legal and not equitable. The statute of Nevada follows that of all the States which have adopted a code and abolishes all distinctions in forms of action. It gives but one action, and requires the facts to be set out in the complaint If, upon those facts the action, at common law, would have been at law, then the action is a legal one, but if it is one which, before the code and under the common law practice, would have been brought by bill in equity, then it is equitable and governed by the settled rules in equity.

It seems to me that the action is at law. It is a proceeding or suit to settle the *right of possession* to the mining premises in dispute. That is all. The United States Statute of 1872, provides simply for a suit to determine *the right of possession.*

The Nevada statute was passed shortly after that statute and evidently in aid of it.

Golden Fleece vs. *Cable Co.*, 12 Nev., 320.

That statute was passed on the day of , 1873, and is in these words:

> "In all actions brought to determine the *right of possession* of a mining claim, or metalliferous vein or lode, where an application has been made to the proper officers of the Government of the United States, by either of the parties to such action for a patent for said mining claim, vein or lode, it shall only be necessary to confer jurisdiction on the court to try said action and render a proper judgment therein, that it appear that an application for patent for such mining claim, vein or lode has been made, and that the parties to said action are claiming such mining claim, vein or lode, or some part thereof, or the right of possession thereof."
>
> Sec. 1,674, Compiled Laws, Vol. I, p. 452.

Neither of these statutes contemplated the fee as being in controversy, for that was supposed to remain in the United States until after the suit had ended, when a patent might issue which would convey the fee.

It has been universally held in all the mining states and territories that in actions of this kind the parties were entitled to a jury. That is a significant fact and shows the understanding of the courts and profession that the action is legal and not equitable; and in this case the parties were careful to see that the right to a jury was expressly waived and the cause submitted to the court. If the action had been understood to be equitable and not legal it would not

have occurred to them to waive a jury for neither party would have been entitled to one.

But if the court should be of the opinion that the action is an equitable one and that the patent was voidable; it will be claimed by the other side, at least it was in the court below, that the defendant should be adjudged a trustee, holding the legal title for the benefit of the plaintiff's and that a decree should be entered to that effect.

To this view there are several objections. In the first place there is no predicate laid for such a decree in the complaint.

It does not ask for any such relief. No rule is better settled than the one that the decree must be *secundum allegata* as well as *secundum probata*. It is no answer to this objection to say that the fact of title by patent was first introduced into the case by the amended answer of the defendant, and that the patent was obtained after the commencement of this suit. If it had been desired to make the defendant a trustee, the complaint should have been amended and apt words introduced showing that such was one of the objects of the suit.

Under the Practice Act of Nevada the allegations of new matter in the answer are regarded as denied without reply or replication. Section 65 is in these words:

> "The allegations of new matter in the answer shall, on the trial, be deemed controverted by the adverse party."

The relief to be granted is provided for in section 150, as follows:

> "The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his petition; but, in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue."

It is important, therefore, to inquire what is "new matter" and what relief is there "embraced within the issue" in this case.

New York was the first State to adopt a code, and it has been the pioneer State in its construction, and its code and construction have gone into the other code States.

The term "new matter" has, in that State, a clear and well-defined signification.

It is "that which admits and avoids the cause of action set up in the complaint, and constitutes a defense."

Bellinger vs. *Craigne*, 31 Barb., 534;
Gilbert vs. *Cram*, 12 How., 455;
Radde vs. *Ruckgaber*, 3 Duer, 684;
Brazill vs. *Isham*, 12 N. Y., 17;
Carter vs. *Koengley*, 14 Abb., 147;
S. C., 9 Bosw., 583;
McKyring vs. *Bull*, 16 N. Y., 297;
Texier vs. *Gouin*, 5 Duer, 389.

An answer which negatives the essential allegations of a complaint, or states circumstances which, if testified to by credible witnesses, would disprove them, is not one containing new matter within the meaning of those words as used in the code.

Radde vs. *Ruckgaber*, 3 Duer, *supra*.

Thus, where, in an action for malicious prosecution and false imprisonment, the complaint alleged want of probable cause, a statement of facts in the answer, showing the existence of such want of probable cause, is not new matter, but only evidence that the allegation of want of probable cause in the complaint is untrue. *Rost* vs. *Harris*, 12 Abb., 446. And in general, a denial of any fact which the plaintiff is bound to prove on the trial in order to make out his

cause of action, is not new matter. *Stoddard* vs. *Onondaga* An. Conference, 12 Barb., 573; *Amburger* vs. *Marvin*, 4 E. D. Smith, 393; *Haight* vs. *Child*, 34 Barb., 186.

In the case at bar the only allegation that can possibly be claimed to be new matter is that setting up title in the Richmond Company; that is not new matter; it is only an affirmative method of denying title in the plaintiffs.

In *Fish* vs. *Caler*, 21 Cal., 74, the court had occasion to consider what was new matter. The code of that State, on this point, is the same as that of New York and Nevada.

The court said:

> "New matter is that which admits the facts alleged as the ground of relief, but avoids them by introducing a new subject of controversy, operating as a defense. . . . Whether matter is new or not must be determined by the matter itself and not by the form in which it is pleaded—the test being whether it operates as a traverse or by way of confession and avoidance.
>
> "A plea tendering no new issue, but controverting the original cause of action is a mere traverse. . . . New matter involves of necessity a new issue, or the introduction of a new ingredient as the basis of one, and a new issue can only arise upon a plea of confession and avoidance."

In *Goddart* vs. *Fulton*, 21 Cal., 430, the court said:

> "If what is claimed as new matter is in effect only a denial of the allegations of the claimant it is not new matter within the meaning of the Practice Act. The circumstance that the answer consists of affirmative allegations, instead of a direct negative of the allegations of the complaint, does not determine that it consists of new matter. Thus, in the case of *Frish* vs. *Caler* (*ante*. 71,) recently decided by this court, an answer avering payment of the promissory note, which was the cause of action, was held not to be new matter, because, although it was an affirmative allegation, its effect was only a denial of an essential allegation of the complaint, to wit: the non-payment of the note.

> . . . . Whether matter is new or not, must be determined by the matter itself, and not by the form in which it is pleaded, *the test being whether it operates as a traverse or by way of confession and avoidance.* If the answer either directly or by necessary implication admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter. *But, if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter, but only a traverse.* . . . . . "They" (the facts,) "do not directly or impliedly admit that McKee had a cause of action."

The same court, in *Doyle* vs. *Franklin*, 40 Cal., 436, said:

> "It is claimed that the answer contains a cross-complaint which should have been answered by the plaintiff, and, not being answered, is admitted. This cross-complaint is the averment that the defendant is the owner of the demanded premises and in possession; and that the plaintiffs' claim is a cloud upon the title. These averments are set up as a defense, and not as the foundation of a claim for affirmative relief against the plaintiff. They are all appropriately matters of defense, and except as to the possession of the defendant, are all controverted by the positive averments of the complaint, and that fact, *i. e.*, the defendants' possession, is essential to the plaintiff's case."

In *Marshall* vs. *Shafter*, 32 Cal., 177, the court said:

> "It is settled beyond all controversy in this State, that the defendant may, under the general denial given in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter, and therefore the allegations of title in the defendant do not present a new issue."

To the same effect is *Kahn* vs. *Old Telegraph Mining Co.* 2 Utah, 174, and numerous other cases.

The authorities generally hold that when title has been acquired after the commencement of the suit, it must be set out in the pleadings. But the reason of that is that otherwise *it would not be known, in a subsequent suit, that the after-acquired title had been in issue in the former.*

In the light of these authorities, the answer of the Richmond Company did not contain any new matter, and unless it did, no relief can be claimed except such as is demanded in the complaint.

There is no demand in it that the Richmond Company be declared a trustee for the plaintiffs. There is nothing of the kind "embraced within the issue," and no such thing is anywhere intimated in the pleadings. If there were new matter, and if this court could attack a patent collaterally, it would be very loose practice to allow a patentee to be declared a trustee, upon some supposed statement, in some supposed replication which had never been filed. An examination of the record in such a case would give no intimation of the ground on which such a decree would rest. This court will not be inclined to encourage such looseness and uncertainty in practice and pleadings.

But, in the second place, the Richmond Company should not be declared a trustee for the plaintiffs, because they have not put themselves in a condition to demand a patent for themselves. They have not done all that the law requires; they have not done the requisite amount of work; have not made the necessary proof; have not completed their entry or paid the purchase money, and have not paid or tendered to the Richmond Company the purchase money of five dollars per acre. Surely they cannot demand a patent until all of these things have been done, and they cannot ask the court to place them in any more favorable condition than the law does or would if they themselves were applicants for

patent. This was expressly decided in *Meyendorf* vs. *Frohner*, 3 Montana, 322–3,

4. *The court erred in holding the Victoria patent void.*

The record shows that there was a surface conflict between the Uncle Sam and the Victoria. (Seventeenth finding and Exhibit H, Record, p. 22.)

And that the mining ground in dispute lies between planes drawn vertically down through the end lines of the Victoria patented claim extended from the foot wall to the hanging wall of the lode. (Thirtieth finding, Record p. 25.)

And that no adverse claim was filed against the application of the Victoria for patent. (Nineteenth finding, Record, p. 22.)

The claim was located after the Uncle Sam. The application for patent was made on the 18th of October, 1878, and the patent issued on the 28th of February, 1880. (Record, p. 22, 19th finding.)

The Supreme Court of Nevada held that it was not necessary that there should be an adverse claim filed against the Victoria, because *the lode was already in conflict in the St. George proceedings.* It held that the patent to the Victoria was absolutely void.

In my opinion this was a manifest error.

It is the land that contains the mineral that is the subject conveyed by the patent. It is the land—a certain fixed portion of the earth—that the land department is authorized to dispose of. When it contains mineral the mineral goes with the land. When an adverse mineral claim is spoken of in the statute it means an adverse claim to the surface of the earth—a surface conflict.

This will appear from the language of the various statutes.

The first statute passed by Congress on the subject of acquiring title to minerals, in its first section declared:

> "That the mineral *lands* of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation."
>
> Act of July 26, 1866, 14 Stat., 251.

The act of May 10, 1872, was equally explicit. It declared that—

> "All valuable mineral deposits *in lands* belonging to the United States," &c.
>
> Rev. Stat., 2,319.

> "A patent for *any land* claimed and located for valuable deposits may be obtained in the following manner." . . . . Any person . . . . "having claimed and located *a piece of land*," &c., ... shall thereupon be entitled to "a patent for *the land*" . . . . "upon the payment to the proper officer of five dollars *per acre*."
>
> Rev. Stat., Sec. 2,325.

The "claim" for patent and the "adverse claim" thereto relate to the land applied for and nothing else.

The applicant for patent, "authorized to locate a claim under this chapter" must file "a plat and field notes of the claim," . . . "showing accurately the boundaries of the claim which shall be distinctly marked on the ground," . . . and must post the plat, "in a conspicuous "place on the land embraced in such plat." The register must advertise in a newspaper "nearest to such claim;" the applicant must have done a certain amount of work "upon the claim;" the United States Surveyor General must certify:

> "That the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim."

"If no adverse claim shall have been filed with the register," &c. "Where an adverse claim is filed during the period of publication" it must "show the nature, boundaries and extent of such adverse claim." The adverse claimant, within thirty days "after filing his claim" must commence proceedings to determine "the right of possession." After judgment "the party entitled to the possession of the claim, or any portion thereof," may file a certified copy of the judgment roll and the certificate of the surveyor-general that the requisite amount of labor has been expended, "and the description required in other cases" and "pay five dollars per acre for his claim." . . . and thereupon "a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." If several parties are entitled to "separate and different portions" . . "patents shall issue to the several parties according to their respective rights."

Rev. Stat., sec. 2325–2326.

These various specific provisions demonstrate that the adverse claim must relate to the land and be a surface conflict. They cannot be satisfied by referring them to the lode. How can the adverse party give the nature, boundaries and extent "of his lode, or the description required in other cases," and pay "the five dollars per acre," if the lode, and not the land, is meant?

The land department has always given this construction to what is required to make an adverse claim. The commissioner, uniformly followed it, and in the case of *The Julia* vs. *Chollar Potosi*, Secretary Delano, Feb'y 24, 1873, held that an adverse claim must be a surface conflict. He fully considered the subject and decided as I have stated. (Copp Mining Decisions, 101.)

He said:

"There is no claim on the part of the Chollar Potosi Company that their surface rights conflict with the surface claims of the Julia Company. . . . The question thus raised is whether the protest entered by the Chollar Potosi Company against the issuance of patent to the Julia Company and the reasons assigned by the Chollar Potosi Company for such patent, constitute 'an adverse claim' within the meaning and spirit of the third and sixth sections of the act approved July 26, 1866." . . .

"In regard to the surface possession of the property sought to be patented by the Julia Company there is no controversy, nor 'opposing claim.' It is asserted however, that the Comstock lode, previously patented to the Chollar Potosi Company, underlies the surface of the several claims, for which the Julia Company ask patents, and it is also asserted that there is no lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar or copper beneath the surface of the several claims of the Julia Company, except it be the Comstock lode, embraced in their patent, before referred to. Is this such an 'adverse claim' to the possession or 'right of possession' of the Julia Company as is referred to in the third and sixth sections of the act? Does this raise a 'controversy' or opposing claim' in regard to the 'possession' of the property for which the Julia Company is seeking patents? If so, how is the adjoining land to be sold subject to the rights of the Chollar Potosi Company? If, by merely asserting that the lode patented to this company is the only lode underlying the land claimed by the Julia Company, they can prevent the issuance of a patent to the Julia Company until the question is settled as to whether their assertion is correct or erroneous, how can such 'adjoining land' ever be sold 'subject to the rights' of the Chollar Potosi Company?"

To the like effect was the opinion of the Assistant Attorney General in the case of *Becker* vs. *Central City*, Week's Mineral Lands, §148. He said:

"In the present case the application for a patent includes the surface and soil, as well as the

> mineral. I am of the opinion that the persons in possession of this surface are adverse claimants, and have an adverse claim, within the meaning of this law, and are entitled to be heard in the local courts before patent is issued."

The courts have always adopted this construction, saving and excepting the decision of the Nevada Supreme Court in this case. That court formerly thought otherwise. In *Golden Fleece* vs. *Cable Consolidated*, 12 Nev., 312, it said:

> "It is true that the vein is the principal thing, and the surface is but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim."

This Court has virtually settled the question in *Mining Company* vs. *Turbet*, 98 U. S., 463. It there held that a mining location under the act of 1866 should be made lengthwise along the vein, and if it were made otherwise it would include only so much of the vein as the location actually covered; and that a location made crosswise of the vein only secured so much of the vein as it actually crossed, at the surface, and its side lines thereby become its end lines.

This decision made the surface the controlling element.

If we abandon the surface conflict as the one thing which is absolutely essential to make an adverse claim, we shall be at sea, and no one can possibly know when he is safe. If we make the identity of the vein or lode the test, there will be no end of evil results. Take this Ruby Hill lode as an illustration. It is from 500 to 1,500 feet in width and about a mile in length. A makes a location on the eastern side, and B locates adjoining land overlaping his location upon A, and when A applies for patent B files

his adverse claim and commences suit. While this is going on A goes to the western side of the hill, a mile distant from the first location, and makes another location there. Now, if the doctrine of the Supreme Court of Nevada is law, B would not be bound to file any adverse claim to this last location of A. He could rely upon his old location, a mile distant, and claim that inasmuch as there was but one lode and there was a surface conflict about that, a mile distant, he was under no obligatien to file any adverse claim.

It cannot be that such is the true construction of the statute. It intended to make an end of controversy at some point. It provided that an adverse claim should be filed in a certain and particular manner, and if it were not filed that fact should *conclusively* show that there was no adverse claim, and any holder of such claim should be forever barred from asserting it.

This was the view taken by Mr. Justice FIELD in *Eureka Co.* vs. *Richmond Co.*, 4 Sawyer, 302. He said:

> "When one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location, objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them or he will afterwards be precluded from objecting to the issue of the patent. . . . . The *silence of the first locator is, under the statute, a waiver of his priorty.*"

These defendants in error cannot and ought not to complain. They had notice of the application of the Victoria for patent. It was published 60 days in the paper nearest to the land. It was their business to keep a vigilant eye upon all publications for patent, and if they did not they have no one to blame but themselves. They seem to have been indifferent, not only in regard to the Victoria, but the

St. George. They were actually notified of the decision of the Commissioner of the General Land Office granting the St. George patent, and were given 60 days in which to appeal to the Secretary. They would not appeal. They preferred to stand on their dignity and strict legal rights. They voluntarily chose their status. Let them now stand by it.

Many other questions might be made in this case. They are made and considered in the brief of my learned associate to which I invite the attention of the court. There was error in the court below and its judgment should be reversed.

WALTER H. SMITH,
Of Counsel for Plaintiff in Error.

114-5-76

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE RICHMOND MINING COMPANY OF NEVADA,
Plaintiff in Error,
vs.
E. H. ROSE, J. W. HIXON, GEO. W. MERRILL, AND SELDEN HETZELL,
Defendants in Error.
No. 248.

BRIEF FOR DEFENDANTS IN ERROR.

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of Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

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No. 248.

In Error to the Supreme Court of the State of Nevada.

The two counsel appearing for plaintiff in error file separate briefs. Each makes a different assignment of errors, and whilst in the aggregate such assigned errors are exceedingly numerous, many of them are ignored in their subsequent arguments. Each makes his own statement of the case, in which each varies materially from the other and occasionally from the record. It is a fair inference that opposing counsel do not entirely agree as to the questions brought up for review. Hence we make our own statement of the case, as leading up to our discussion of what we understand to be the relevant questions for consideration and decision.

STATEMENT.

This is an action brought by the defendants in error, in the District Court of Eureka County, Nevada, "to deter-

" mine the question of the right of possession " to certain mining premises.

Rec., p. 1.

It arose upon the adverse claim of Rose *et al.*, owners of the Uncle Sam mining claim, and which adverse claim was filed against the application of the Richmond Company for patent upon the St. George Mine, pursuant to sec. 7 of the mining act, approved May 10, 1872. (R. S., sec. 2326.)

Rec., 29–34.

The cause was heard in the District Court sitting without a jury. Judgment was rendered therein for the defendant, the plaintiff in error here.

Rec., 5, 6.

On appeal the Supreme Court of Nevada reversed the judgment below and directed the District Court to enter judgment for the plaintiffs (Rose *et al.*) " for all that por- " tion of the mineral lode in controversy westerly of the " westerly end line of the Tip-Top claim, designated by " the line A C on the diagram." Also " to enter an order " making the injunction against defendant to this portion " of the lode perpetual, * * * also to render a judg " ment in favor of defendant for all that portion of the lode " easterly of the line A C on the said diagram."

Rec., 64.

Such judgment was rendered by the District Court.

Rec., 65, 66.

The subject-matter of controversy is that portion of the lode awarded Rose *et al.* lying " westerly of the westerly " end line of the Tip-Top claim designated by the line A " C on the diagram."

See diagram opposite Rec., 65.

The findings of fact by the trial court formed the basis of the judgment below and control here. Same appear at large in the record.

Rec., 19–25.

The general locus of the controversy is described by the second finding of fact, thus, (Rec. 19)—

"That the mining ground in controversy is situated on "Ruby Hill, in the Eureka Mining District, Eureka Coun- "ty and State of Nevada; that along and through the hill "for a distance slightly exceeding a mile, and extending in "a northwesterly and southeasterly direction, is a zone of "limestone, in which, at different places throughout its "length, mineral is found. Underlying this zone on the "southerly side is a well-defined unbroken foot wall of "quartzite, which foot wall has a general dip to the north- "east. On the northerly side of this zone of limestone is "a hanging wall of shale. This zone of limestone is a vein "or lode of rock in place, bearing gold, silver, lead, and "other valuable minerals."

The several mining claims or locations under which the parties here litigant claim, are, by the seventeenth finding, "all on the same vein or lode," being that described in the second finding, (*supra.*)

Rec., 22.

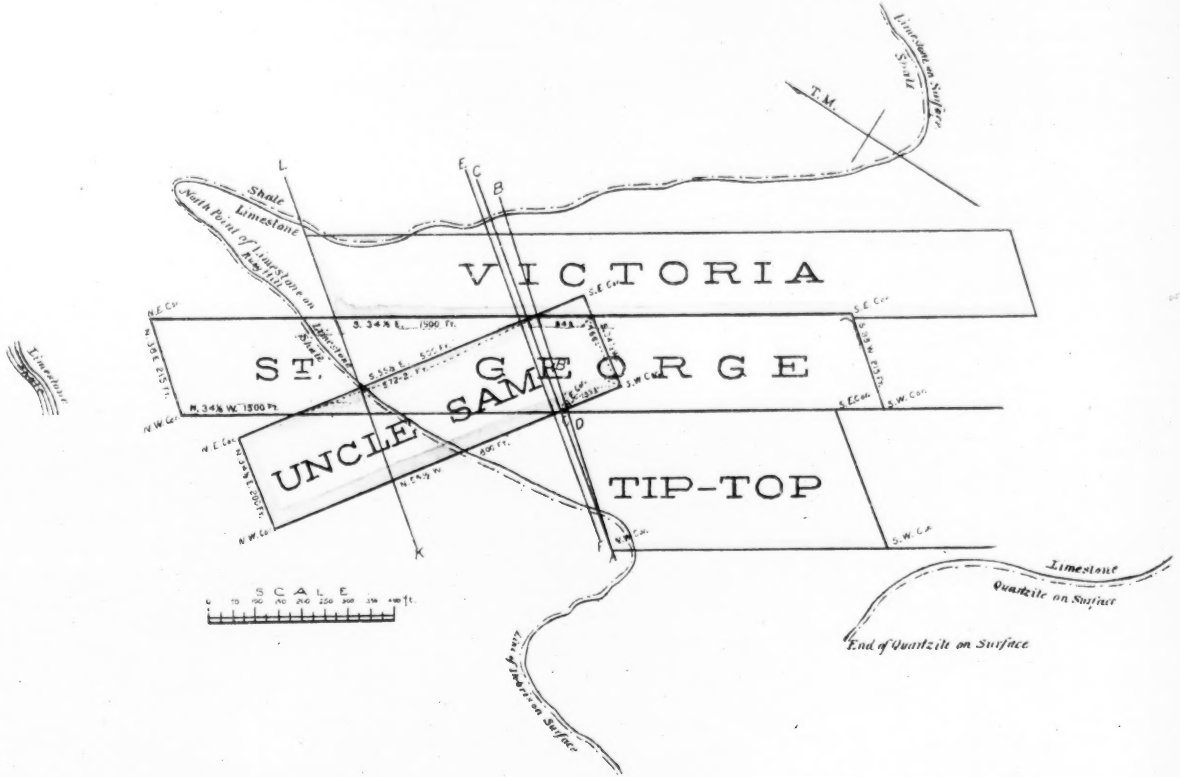
The act of July 26, 1866, (14 Stats., 251,) opening the mineral lands of the public domain to exploration, occupation, and purchase by qualified citizens, gave the claimant, by sec. 4, "the right to follow such vein to any depth, with "its dips, variations, and angles."

And sec. 3 thereof provided that patents issued thereunder should convey the mine, "with the right to follow "such vein or lode, with its dips, angles, and variations, to "any depth, although it may enter the land adjoining, which "land adjoining shall be sold subject to this condition."

The mining act of May, 10, 1872, (17 Stats., 91,) which superseded the act of 1866, materially enlarged the rights of mineral claimants. By section 3 it provided:

"That the locators of all mining locations heretofore "made, or which shall hereafter be made, on any min- "eral vein, lode, or ledge, situated on the public domain, "their heirs and assigns, where no adverse claim exists at "the passage of this act, so long as they comply with the "laws of the United States, and the State, territorial, and "local regulations not in conflict with said laws of the "United States governing their possessory title, shall have "the exclusive right of possession and enjoyment of all the "surface included within the lines of their locations, and of "all veins, lodes, and ledges throughout their entire depth, "the top or apex of which lies inside of such surface-lines "extended downward vertically, although such veins, lodes, "or ledges may so far depart from a perpendicular in their "course downward as to extend outside the vertical side- "lines of said surface locations: *Provided*, That their right "of possession to such outside parts of such veins or ledges "shall be confined to such portions thereof as lie between ver- "tical planes drawn downward as aforesaid, through the end- "lines of their locations, so continued in their own direction "that such planes will intersect such exterior parts of said "veins or ledges: *And provided further*, That nothing in "this section shall authorize the locator or possessor of a "vein or lode which extends in its downward course beyond "the vertical lines of his claim to enter upon the surface of "a claim owned or possessed by another."

By reference to the diagram attached hereto, the "hang- "ing wall of shale" appears on the northerly side of the zone of limestone, represented by dotted line colored blue, and so marked. On the southerly side appears the "well-de- "fined unbroken foot-wall of quartzite," represented and marked in the same manner. Between the shale and the quartzite lies this "zone of limestone," which the second


VICTORIA
ST. GEORGE
UNCLE SAM
TIP-TOP
Shale
Limestone
North Point of Limestone on Surface
Limestone on Surface
T.M.
L
K
B
C
D
E
F
S. 34¼ E. 1500 Ft.
N. 34¼ W. 1500 Ft.
S. 55¼ E. 522 Ft.
S. 12½ E. 1200 Ft.
N. 55¼ W. 600 Ft.
N. 12½ W. 600 Ft.
S.E. Cor.
S.W. Cor.
N.E. Cor.
N.W. Cor.
SCALE
Limestone
Quartzite on Surface
End of Quartzite on Surface
Lake Superior Surface

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"That the locators of all mining locations heretofore "made, or which shall hereafter be made, on any min- "eral vein, lode, or ledge, situated on the public domain, "their heirs and assigns, where no adverse claim exists at "the passage of this act, so long as they comply with the "laws of the United States, and the State, territorial, and "local regulations not in conflict with said laws of the "United States governing their possessory title, shall have "the exclusive right of possession and enjoyment of all the "surface included within the lines of their locations, and of "all veins, lodes, and ledges throughout their entire depth, "the top or apex of which lies inside of such surface-lines "extended downward vertically, although such veins, lodes, "or ledges may so far depart from a perpendicular in their "course downward as to extend outside the vertical side- "lines of said surface locations: *Provided*, That their right "of possession to such outside parts of such veins or ledges "shall be confined to such portions thereof as lie between ver- "tical planes drawn downward as aforesaid, through the end- "lines of their locations, so continued in their own direction "that such planes will intersect such exterior parts of said "veins or ledges: *And provided further*, That nothing in "this section shall authorize the locator or possessor of a "vein or lode which extends in its downward course beyond "the vertical lines of his claim to enter upon the surface of "a claim owned or possessed by another."

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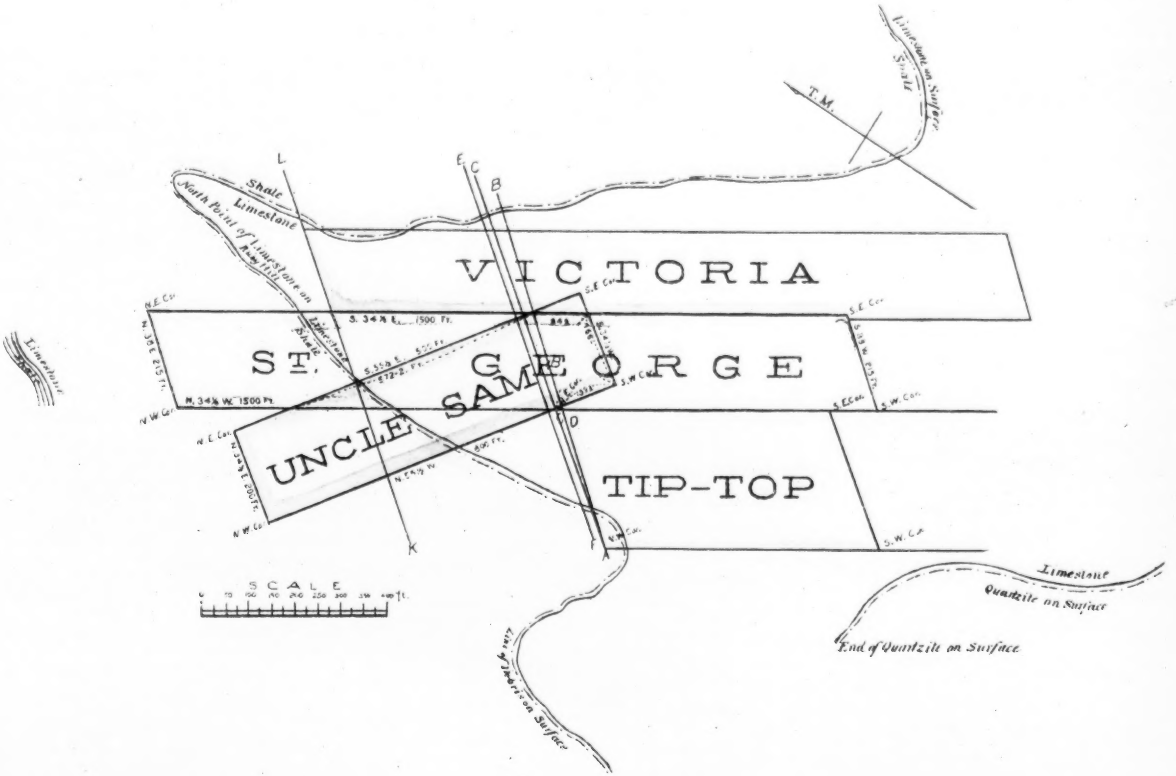
VICTORIA
ST. GEORGE
UNCLE SAM
TIP-TOP
Limestone on Surface
Shale
Limestone
North Point of Limestone on Surface
Shale
Limestone
Limestone
Quartzite on Surface
End of Quartzite on Surface
Limestone on Surface
Shale
T.M.
L
K
E
C
B
D
A
N.E. Cor.
S.E. Cor.
N.W. Cor.
S.W. Cor.
S. 34° E. 1500 Ft.
N. 34° W. 1500 Ft.
SCALE

finding, *supra*, declares is "a vein or lode of rock in place, "bearing gold, silver, lead, and other valuable minerals."

The lode in the vicinity of this controversy is between 800 and 1,000 feet in width. As appears by the diagram and the findings, the locations of the Uncle Sam, Tip Top, St. George, and Victoria claims are all within the surface width of this single lode. The Uncle Sam is owned by the defendants in error. The Tip Top, St. George, and Victoria are owned by the plaintiff in error.

The Tip Top is the earliest location and has been patented. The extension of its westerly end-line, between the points A C, covers the entire width of the lode and takes all the lode lying *easterly* of such line A C. That is conceded on all sides.

West of the line A C the defendants claim priority of right by reason of priority of location under the Uncle Sam claim. *Per contra*, the plaintiff in error claims priority of right by virtue of the St. George and Victoria claims, and the patents issued thereon, up to the westerly end-line of the Victoria and for the full width of the lode as represented by the line K L.

The portion of the lode lying between the line A C on the east and the line K L on the west is therefore the subject-matter of controversy. None of the surface claims cover the entire width of the lode; but the right is given by the statutes of 1866 and 1872 to follow the lode, although it may so far depart from a perpendicular in its course downward "as to extend outside the vertical side lines of "said surface locations," and the limitation of such right is fixed by Sec. 3, act of May 10, 1872, *supra*, as to such "outside parts" of the lode "to such portions thereof as lie "between vertical planes drawn downward as aforesaid "through the end-lines of their locations, so continued in

"their own direction that such planes will intersect such "exterior parts of said veins or ledges."

The lines A C and K L represent such "vertical planes."

As appears by the diagram, the Uncle Sam location covers all that portion of the lode lying between the lines A C and K L. If that location is prior in time and the owners thereof (Rose *et al.*) have done the acts and things prescribed by the statute in initiating and maintaining their claim thereunder, then they have clear priority of right. If, *per contra*, they have failed to so initiate and maintain such prior right, then they necessarily fail.

Inasmuch as the Tip Top claim and patent embraces only that portion of the lode east of its westerly end-line, (the line A C,) and as to which there is here no controversy, we eliminate same from further discussion.

As to the ground in controversy, the respective dates of location and consequent initiation of right are as follows:

Jan'y 14, 1872, the Uncle Sam claim was located and recorded. Under it the defendants in error claim.

March 20, 1873, the St. George claim was located, covering a portion of the prior Uncle Sam claim, as appears from the diagram.

The exact date of the Victoria location does not appear from the findings. By the 19th finding, however, it was "located subsequent to the Uncle Sam claim."

Rec., 22.

And in the decision of the trial Court the date is stated as about December 7, 1872.

Rec., 17.

It thus appears that the Uncle Sam location is prior in

time, but the plaintiff in error asserts priority of right under patents issued upon the St. George and Victoria claims. The Court below has declared these patents void for reasons to be presently stated.

TITLE OF DEFENDANTS IN ERROR.

The fifth finding of fact recites (Rec., 20)—

"That the Uncle Sam mining claim was located upon "this zone of limestone on the 14th day of January, A. D. "1872, by E. H. Rose, J. W. Hixon, and Louis Milton, and "there was included in said location eight hundred linear "feet of said zone, 200 linear feet having been located for "a discovery claim. That they recorded the notice of loca- "tion in due time, and marked the boundaries of the claim "before the St. George was located."

The sixth finding of fact recites (Rec., 20)—

"That Rose and his associates made the Uncle Sam loca- "tion in good faith, and in accordance with the customs and "usages of the majority of the miners in said mining dis- "trict, and they and their grantees have ever since remained "in the actual possession of said Uncle Sam location, as "located, to the extent of annually sinking a shaft thereon, "maintaining and at times occupying a cabin thereon, and "since the month of ——, 188–, excavating drifts and tun- "nels thereon, and that $466 worth of work had been done "on the Uncle Sam, including a cabin built to live in, cost- "ing $136, up to January 1, 1877."

The eleventh finding of fact recites (Rec., 21)—

"That Rose and his co-locators did the amount of work "required to hold said Uncle Sam mining claim under the "laws of the United States, and their successors in interest "continued to do the necessary work to hold said claim "after succeeding to the interests of Rose and his co-loca- "tors up to the time of this trial, but none of said work

" was done upon that portion of the Uncle Sam claim em-
" braced within the surface limits of the St. George patent,
" but such work was done inside of the Uncel Sam location
" as located."

By findings 20, 27, 28, and 29 (Rec., 23–25) it appears that the title of the locator, Louis Milton, passed by due conveyance, March 2, 1872, to his co-locator, E. H. Rose. That Rose and Hixon, on October 20, 1873, conveyed an undivided portion of the Uncle Sam claim to Geo. W. Merrill and Selden Hetzel. That these individual owners, on September 30, 1878, conveyed the premises to the Uncle Sam Mining Company, an organized and existing corporation, which, on April —, 1880, conveyed the same premises to the Albion Consolidated Mining Company, which company is now prosecuting this action by the consent of the defendants in error above named.

TITLE OF PLAINTIFF IN ERROR.

The thirteenth finding of fact recites, (Rec., 21)—

" That the defendant, on the 1st day of August, 1873,
" made an application through the local United States Land
" Office at Eureka, Nevada, for a patent to the St. George
" Mining Claim, and the St. George claim was located on
" the 20th day of March, 1873, subsequent to the location
" of the Uncle Sam."

The fourteenth finding recites, (Rec., 21)—

" That on the 29th day of September, 187 , and within
" the period allowed by law for publication of notice, E. H.
" Rose and J. W. Hixon filed a protest in said Land Office,
" which showed the boundaries and extent of plaintiff's
" claim against said application, a copy of which is hereunto
" annexed, marked 'C,' and made a part hereof."

Such protest was filed pursuant to sec. 7, act of May 10, 1872, (R. S., sec. 2326,) which provides—

" Where an adverse claim is filed during the period of " publication, it shall be upon oath of the person or persons " making the same, and shall show the nature, boundaries, " and extent of such adverse claim, and all proceedings, ex- " cept the publication of notice and making and filing of " the affidavit thereof, shall be stayed until the controversy " shall have been settled or decided by a court of competent " jurisdiction, or the adverse claim waived. It shall be the " duty of the adverse claimant, within thirty days after " filing his claim, to commence proceedings in a court of " competent jurisdiction, to determine the question of the " right of possession, and prosecute the same with reason- " able diligence to final judgment; and a failure so to do " shall be a waiver of his adverse claim. After such judg- " ment shall have been rendered, the party entitled to the " possession of the claim, or any portion thereof, may, with- " out giving further notice, file a certified copy of the judg- " ment-roll with the Register of the Land Office, together " with the certificate of the Surveyor-General that the re- " quisite amount of labor has been expended or improve- " ments made thereon, and the description required in other " cases, and shall pay to the Receiver five dollars per acre " for his claim, together with the proper fees, whereupon " the whole proceedings and the judgment-roll shall be cer- " tified by the Register to the Commissioner of the General " Land Office, and a patent shall issue thereon for the claim, " or such portion thereof as the applicant shall appear, from " the decision of the Court, to rightly possess. If it ap- " pears from the decision of the Court that several parties " are entitled to separate and different portions of the claim, " each party may pay for his portion of the claim, with the " proper fees, and file the certificate and description by the " Surveyor-General, whereupon the Register shall certify " the proceedings and judgment-roll to the Commissioner of " the General Land Office, as in the preceding case, and " patents shall issue to the several parties according to their " respective rights. Nothing herein contained shall be con-

" strued to prevent the alienation of the title conveyed by " a patent for a mining claim to any person whatever."

In support of this protest and pursuant to the requirement of this section, the required proceeding was commenced within thirty days after filing of same, viz., Oct. 21, 1873, by Rose *et al.*, " in a court of competent jurisdic- " tion to determine the question of the right of possession," and is the identical action now brought here on writ of error. (Rec., 21.)

By findings 21, 22, 23, and 24, (Rec., 21–23,) it appears that the Richmond Company, as defendant, appeared on Nov. 1, 1873, and filed demurrer, which was superseded by an answer filed Nov. 26, 1873. That the cause being thereafter at issue was not tried because of pending negotiations for settlement of the controversy, it being the expectation that the suit would be amicably settled, or that the defendant would abandon its claim to the ground in controversy or purchase the Uncle Sam location. That at the March term, 1874, of the Court, the cause was continued at request of defendant's counsel, and no further proceedings of any kind were had therein until the March term 1880, of the same court.

By the 25th finding (Rec., 25) it appears that in Sept., 1876, the Richmond Co. presented to the Register and Receiver of the United States local Land Office the certificate of the Clerk of the Court wherein the adverse suit was pending, that the stated action " had not been placed upon " the calendar, nor had any proceedings been had therein " from the March term, 1874, to the date of the said cer- " tificate;" and thereon asked to consummate the St. George entry. That those officers thereupon ruled that the suit had not been prosecuted with due diligence to a final determination, as the statute required, and thereupon transmitted

all the papers relating to the application and adverse claim to the Commissioner of the General Land Office at Washington. No notice of this action was given the adverse claimants. The *ex parte* showing of the Richmond Company was accepted by the Commissioner, and the ruling of the Register and Receiver affirmed. Notice was given Rose *et al.* by the Commissioner of his decision, and time allowed for appeal to the Secretary of Interior; but no appeal being taken by them, patent was issued to the Richmond Company for the St. George claim May 7, 1877, and whilst the adverse suit was still pending and undetermined.

Upon these facts the District Court announced the conclusion (Rec., 25)—

"That the said patent of the United States to the Rich-
"mond Mining Company of Nevada, the defendant herein,
"for the said St. George mine and premises, in and to that
"portion thereof which was covered by the adverse claim
"of the said plaintiffs herein, is utterly void and of no
"effect, either in law or equity, for the reason that the St.
"George patent was issued without authority of law, while
"the land embraced in the *protest* against the issuance of
"the patent was reserved from sale as effectually, so far as
"the defendant's right to purchase the same under its St.
"George location was concerned, as though there had been
"a special act of Congress excluding it."

This conclusion was, for like reason, affirmed by the Supreme Court of the State.

Rec., 60.

From the 19th finding of fact (Rec., 22) it appears—

"That after the issuance of the patent to the Richmond
"Mining Company of Nevada of the St. George claim, as
"before stated, said Richmond Mining Company of Nevada,
"on the 18th day of October, 1878, made an application for

" a patent to the United States for a mining claim known " as the Victoria claim, which claim had been located sub- " sequent to the location of the Uncle Sam claim, and pro- " cured a patent from the United States therefor on Feb- " ruary 28th, 1880, and that no protest was filed against " said application by the plaintiffs in this action."

As appears by the diagram the Victoria claim lies north of the St. Geerge, and does not conflict upon the surface with the Uncle Sam location between the lines A C and K L, being the ground here in controversy.

The District Court held the Victoria patent valid because of failure of Rose *et al.* to adverse the application therefor, and as vesting in the Richmond Mining Company " a good " and valid title in and to all that portion of the lode and " premises lying easterly of the line K L, as shown on Ex- " hibit 'H' of the findings of facts herein."

Rec., 25.

And upon this conclusion rested its judgment in favor of that Company.

The Supreme Court of Nevada held the Victoria patent " absolutely null and void," for reasons recited at length in its opinion, (Rec., 60–62,) and which are summarized therein thus :

" At the time the Victoria patent was issued there was, as " we have several times delared, a valid and pending con- " test between the respondent and appellants in the State " court to determine the right of possession to the identical " lode for which this, as well as the St. George, patent was " issued. During the pendency of this contest the lode was " reserved from sale."

To the prayer of the appellants (Rose *et al.*) (Rec., 63) for " a decree adjudging respondent to be the holder of the " St. George and Victoria patents in trust for them," and

for "an order requiring it to convey to them all rights ac-
" quired thereunder," the Court below responded thus, (Rec., 63:)

" But this course is only pursued in cases where the offi-
" cers of the Government were authorized to act, and by an
" erroneous construction of the law or a misapplication of
" the facts issued the patent to the wrong party. This is
" not such a case. We have decided that both of these
" patents were absolutely void; that they were issued with-
" out authority of law at a time when the Land and Execu-
" tive Departments of the Government had no jurisdiction
" to act in the premises. The lode was reserved from sale;
" neither of the parties to this suit were entitled to a patent
" until the pending contest was finally settled and deter-
" mined in the courts. If this be true, then the patents, in
" so far as they pretend to convey any portion of the lode
" within the limits of the Uncle Sam location, have no valid
" existence in the law. Respondent acquired no rights
" thereunder and has none to convey."

Thereupon judgment was ordered for the plaintiffs (Rose *et al.*) for all that portion of the lode here in controversy, and the " injunction against defendant to this portion of the " lode to be made perpetual." *Supra.*

ERRORS ASSIGNED.

The errors assigned whereon plaintiff in error asks reversal of the judgment below are multiform. Statement thereof may be readily condensed under two heads:

First. Errors founded on the invaldity of the title asserted by defendants in error.

It is urged that the court below erred in rendering judgment for defendants in error, because—

1. From the findings and upon the law the Uncle Sam location was invalid and void, and the locators thereof were

not "entitled to 200 feet along the lode as a discovery "claim."

2. Upon the findings the defendants "were not at any "time the owners of nor seized nor possessed of the mining "ground in controversy."

3. From the findings and upon the law the protest of Rose and Hixon against the application of the Richmond Company for patent on the St. George claim was not "in due "form of law and sufficient."

4. From the findings and upon the law, Rose *et al.* failed to commence this action "within the thirty days after the "filing of the adverse claim," and thereby waived such adverse claim.

5. Upon the findings, if defendants in error "ever had "any rights, legal or equitable, they lost them by laches."

6. From the findings and upon the law, the land officers had jurisdiction to decide that defendants in error "had "waived their adverse claim."

Second. Errors founded on the validity of the title asserted by plaintiff in error.

It is urged that the court below also erred in ruling adversely to plaintiff in error, because—

7. From the findings "possession by the defendant below "of the mining ground in controversy created a presump-"tion of right and ownership in the said defendant not "overcome by any facts contained in the findings," which, coupled with the patents issued to it for the ground in controversy, gave the complete ownership.

8. From the findings, and by issuance of such patents and possession had thereunder by plaintiff in error, all right of action in defendants in error was barred by the statute of limitations.

9. Upon the law plaintiff in error lost no rights by failure

to file plea in abatement or motion to dismiss the action founded on the failure of defendants in error to commence the action in "time;" and similarly waived no rights by failure to move before the land office for dismissal of the adverse claim for insufficiency and failure to seasonably commence suit thereunder.

10. Upon the law filing of adverse claim by Rose *et al.* did not operate "as a reservation of the mining ground in "controversy from sale."

11. The St. George patent was not void.

12. The Victoria patent was not void.

ARGUMENT.

The material questions presented for decision are:

1. Was the Uncle Sam location valid?

2. Was the adverse claim of Rose *et al.* sufficient and this suit thereunder seasonably commenced? If so, what is their effect?

3. Are the St. George and Victoria patents, or either of them, valid, voidable, or void?

I.

UNCLE SAM CLAIM.

The validity of this location is affirmed by the 5th, 6th, and 11th findings and the judgment following, *supra*. The contention, *contra*, is based upon the ground that the locators thereof were not entitled to an additional 200 feet as a "discovery claim," and the claim being an entirety is therefore void.

1. Because the location was made on the great limestone ledge, which had been discovered and located and was

claimed and being worked at the time such location was made; and

2. The Uncle Sam ground, before it was located by Rose *et al.*, had been claimed and located by one Phillips *et al.*

But the sixth finding recites (Rec. 20)—

"That several years prior to the location of the said "Uncle Sam mining claim said zone had been discovered "and a large number of mining claims located upon it, and "at the time the Uncle Sam was located Rose, one of the "locators, knew of the existence of said locations and that "work was being prosecuted thereon. But at the time of "the location of the Uncle Sam, and for a long time prior "and subsequent thereto, it had been the custom and usage "of the larger portion of the miners in Eureka mining dis-"trict and upon this lode or zone to include in their loca-"tion 200 feet for a discovery claim, and it was not known "or believed at the time of the location of the Uncle Sam "that the belt or zone of limestone running through Ruby "Hill constituted one lode or zone, and at the time of the "location of the Uncle Sam the locators thereof believed "that there was no other valid existing location upon the "ground included in the surface boundaries of the Uncle "Sam location, and that Rose and his associates made the "Uncle Sam location in good faith and in accordance with "the customs and usages of the majority of the miners in "said mining district."

The seventh finding recites (Rec., 20)—

"That the said Uncle Sam mining claim adjoins one of "the mining claims that had been located on said zone be-"fore the Uncle Sam was located, viz., the Tip Top, and "that said Rose knew of said Tip Top location, and that "work was being prosecuted thereon when he and his co-"locators located the Uncle Sam mining claim. But Rose "and his associates did not know at the time of the location "of the Uncle Sam that the Tip Top location and the "Uncle Sam location were upon one and the same lode or

" zone; that between the Uncle Sam location and the Tip " Top location there was no surface conflicts."

Upon these established facts the Court below upheld the Uncle Sam location as made in good faith—in accordance with the settled custom of the mining district, and at a time when it was neither known nor supposed that the lode so located was identical with the Tip Top or any other located claim. Its opinion proceeds thus:

" 7. Is the Uncle Sam location invalid?

" It is claimed by respondent that the locators of the " Uncle Sam, by claiming a discovery interest, committed a " fraud upon the Government, and that, by reason thereof, " their entire claim is illegal and void. The act of Con- " gress, under which this location was made, provides 'that " ' no location hereafter made shall exceed 200 feet in length " ' along the vein for each locator, with an additional claim " ' for discovery to the discoverer of the lode.' (14 U. S. " Stat., 252, sec. 4.)

" Appellants contend that the term discovery, as used in " this act, is susceptible of more than one construction, and " that the Courts are justified in defining its meaning to be " ' a discovery made within the limits of the claim located.' " We are of opinion that a broad and liberal interpretation " should be given to this statute. It must be construed " with reference to the intent and object that Congress had " in view at the time of its passage, and in determining this " question it is proper to consider the condition of the coun- " try and the general character of the mineral deposits, " veins, and lodes.

" The object was evidently to encourage the location and " development of mining claims. It was intended that the " adventurous and enterprising prospector, who explored the " mineral regions in search of the hidden treasure, should " be rewarded by the Government with at least 'an addi- " ' tional claim for discovery.' The mineral lodes, in many " mining districts, were concealed from public view. They " did not always 'crop out' upon the surface of the earth.

"There were no landmarks to definitely determine the "length, width, distance, or course of the lode when dis- "covered. It required much time, money, and labor, and "in many cases protracted and expensive litigation to settle "these disputed questions.

"The facts of this case present a fair history of the con- "dition of many of the mining districts in this State, and "eliminate from the case every question as to any intended "fraud upon the Government. They show that Rose was "the first discoverer of the ore body at the point of his lo- "cation, and that he and his associates made the location in "good faith, honestly believing that the location was not "upon any lode that had been previously discovered by "others. Subsequent developments established the fact "that they were mistaken, and the owners of the Uncle "Sam have been legally deprived of all that portion of "their location on the easterly side of the line A C, within "the boundaries of the Tip-Top claim, and it also appears "from the diagrams that over 200 feet of the Uncle Sam "location, on the westerly end, extends beyond the lime- "stone shale into the country rock.

"In illustration of the evil results that would flow from "sustaining respondents' construction of the law, let us sup- "pose that A, in 1870, located a mining claim on the east- "erly end of Ruby Hill, including 200 feet for a discovery "interest; that B two months thereafter went to the west- "erly end, a distance of over one mile, and made a location "upon a body of ore, and, believing it to be upon an en- "tirely distinct lode from the one upon which A had made "his location, claimed 200 feet for discovery; that for years "afterwards numerous other parties came upon the hill and "made divers other locations between the claims of A and "B, each claiming 200 feet for discovery, and for ten or "more years the various claims thus located were worked "and developed upon the theory and belief that each was "upon a separate and distinct vein or lode; and, after this "lapse of time, the expenditure of several hundred thou- "sand dollars, and long protracted and expensive litigation, "it was ascertained, as it finally was on Ruby Hill, (Eureka "Consolidated Mining Company *vs.* Richmond Mining

" Company of Nevada, 4 Saw., 302,) that there was but one " lode, a zone of limestone containing precious metals, vary- " ing in width from 500 to 1,500 feet. The courts would " have to say to B, and all the other subsequent locators " who made locations on this great mineral zone—although " their claims did not in any manner conflict with any pre- " vious locations made upon the lode—that their locations " were absolutely void because the developments, brought " about by time, labor, money, and litigation, had established " the fact that they were all upon the same lode originally " discovered and located by A. To so declare would not " only make invalid most of the early locations on Ruby " Hill, but would, in its effect, entirely upset and destroy, " in many cases, the titles to mining property in the various " mineral districts of this and other States and Territories. " Nevertheless, if the law so directs, in plain and unequivo- " cal terms, it is the bounden duty of the courts to follow " its mandates, although by so doing it would result in great " and manifold injustice. The responsibility would rest " upon Congress, not upon the courts. But we are of opin- " ion that such is not the meaning, object, or intent of the " law, and that such a construction is not warranted either " by the letter or spirit of the statute."

Rec., 55–56.

We submit the foregoing is an absolute demonstration of the question. Nothing need be added thereto. Both the argument and the illustration are complete.

Nor does the prior and abandoned location of Phillips *et al.*, covering the same ground, invalidate the " Uncle Sam " location or discovery claim.

From findings 8, 9, 11, and 12, (Rec., 20, 21,) it appears that prior to Phillips' location Rose had *in fact* discovered ore " at the point where the notice of location of the Phillips " was posted, and had done work at that point," but " that " said Phillips' claim was subsequently abandoned and " prior to the location of the Uncle Sam."

The Court below summarily disposed of this objection thus:

"The fact that Phillips made a prior location of the same "ground is not entitled to any consideration, because this "claim was abandoned prior to the location of the Uncle "Sam."

Rec., 55.

This conclusion concisely states the established law—

"The abandonment determines the right of the party from "the day of the act, and the property is to him as though "he had never owned or occupied it."

Davis vs. *Butler*, 6 Cal., 510.

"Abandonment is a matter of intention, and operates in- "stanter. Where a miner gives up his claim and goes away "from it, without any intention of repossessing it, and re- "gardless of what may become of it or who may appropri- "ate it, an abandonment takes place, and the property re- "verts to its original *status* as part of the unoccupied public "domain. It is then *publici juris*, and open to location by "the first comer."

Derry vs. *Ross*, 5 Colorado, 295.

The same doctrine is affirmed in—

Richardson vs. *McNulty*, 24 Cal., 339.
St. John vs. *Kidd*, 26 Cal., 264.
Morenhaut vs. *Wilson*, 52 Cal., 263.
Mallet vs. *Uncle Sam Co.*, 1 Nev., 188.
Golden Fleece Co. vs. *Cable Co.*, 12 Nev., 312.

If "the additional claim for discovery to the discoverer "of the lode" be subject to the strict construction here contended for; if it be a personal privilege, a right in gross, exercisable only by the discoverer, then Rose *was* the discoverer of this claim within the meaning of the law as

expressly found. (Finding 9, Rec., 21.) The location by Phillips *et al.* being made and abandoned, left the ground vacant. Rose was entitled then to exercise the right given by the law as the discoverer, and claim accordingly. This is the ruling of the trial court.

Rec., 12.

Independent of the established fact that Rose was the first discoverer of a lode upon the ground in controversy, and therefore within the express letter of the statute, the abandonment by Phillips left the ground "as though he had "never owned or occupied it," and it reverted "to its origi- "nal *status* as part of the unoccupied public domain." Whilst thus situate Rose *et al.* made the Uncle Sam location. His claim for "discovery" must be conceded.

This results follows from the mining laws, considered *per se*, and without the aid of extraneous authority. The act of 1866 assumed what the act of 1872 in express terms requires. In other words, the former statute assumed that no location would be made until actual discovery of a vein or lode, and gave as a reward therefor "an additional claim for "discovery." The act of 1872 (R. S., sec. 2320) provides "but no location of a mining claim shall be made until the "discovery of the vein or lode within the limits of the claim "located." Yet the same statute provides (R. S., sec. 2324) that upon failure to perform prescribed annual assessment work "the claim or mine upon which such failure occurred "shall be open to relocation in the same manner as if no "location of the same had ever been made."

If, then, the "discovery" of a vein or lode can be made but *once*, no subsequent party can, on abandonment or forfeiture of the claim and its consequent reversion to the public domain, again locate the premises, for the law (sec. 2320) forbids such location by him "until the discovery

" of the vein or lode within the limits of the claim located." But if the discovery made by the original locator exhausts the right, no subsequent discovery by another can follow; and, by consequence, no valid location of the abandoned premises can again be made. The inhibition would apply to the entire claim, for discovery of the vein within its limits would, on such a theory, forbid the possibility of any new discovery of the same vein within the same limits. A construction leading to such results must of necessity be rejected. It is in direct contradiction of both the letter and spirit of the law.

Whilst, then, the law of 1866 gave only 200 feet for discovery, the act of 1872 gives 1,500 feet upon the same conditions. Yet the rule thereunder is—

" It is not necessary that the locator should be the first " discoverer of the vein, but it must be known to him and " claimed by him in order to give validity to the location."
Jupiter M'g Co. vs. *Bodie Con. M'g Co.*, 7 *Sawyer*, 96.

Even were it possible to hold that the locators of the Uncle Sam were not entitled to an additional 200 feet for discovery, the result would simply be that the location was void for the excess only, and valid to the extent authorized by law. The Court below held on this point thus:

" The most that could possibly be claimed against the " validity of the Uncle Sam location would be that it was " voidable to the extent of the excess of 200 feet, and the " owners of the claim could determine from which end or " ends this excess should be taken. Nothing more than " this result would follow from the reasoning of Beatty, J., " in the Golden Fleece *vs.* Cable Con., *supra*, where an alien " joins in making a location, or from the views expressed " by the Supreme Court of Idaho in Atkins *vs.* Hendree, " where it was claimed that the locators had purposely in- " cluded a greater number of feet than the law allowed, and

" the Court said that 'all the benefit that a subsequent loca-
" ' tor can claim is that he shall be entitled to maintain his
" ' right to the excess.' "
1 Idaho, 112.

To which we add—
Jupiter M'g Co. vs. *Bodie Con. M'g Co., supra.*

And the fact is, as recited by the decision below, (Rec., 55,) " the owners of the Uncle Sam have been legally deprived " of all that portion of their location on the easterly side of " the line A C, within the boundaries of the Tip Top " claim, and it also appears from the diagrams that over 200 " feet of the Uncle Sam location on the westerly end ex- " tends beyond the limestone shale into the country rock," or, in other words, *beyond* the lode. This loss at either end leaves only the claim lying substantially between the lines A C and K L, which does not equal 600 feet in length, and is thus within the maximum length, which, even on our opponents' theory, Rose *et al.* were entitled to locate, and which under the decisions cited they are now entitled to hold.

From foregoing, we submit, the Uncle Sam location was and is a valid claim.

The location was made Jan'y 14, 1872. It does not appear from the findings that at date of the passage of the act of May 10, 1872, (17 Stats., 91, R. S., sec. 2322,) there was any adverse claim then existing to any portion of the ground here in controversy. By sec. 3 of that act, *supra*, and in the absence of such adverse claim, existing at that date, there was granted Rose *et al.* " the *exclusive right of* " *possession and enjoyment of all the surface included with-* " *in the lines of their locations*," as well as all underlying lodes.

The subsequent location of the St. George, made March 20, 1873, which undertook to appropriate a portion of this

same surface ground, whereto Rose *et al.* had by express law "the exclusive right of possession and enjoyment," was in legal effect a trespass and a nullity. The Court below so ruled (Rec., 54) thus:

"If at the time the St. George location was made there "was a prior existing and valid location upon this portion "of the lode, and such location has ever since been legally "maintained, then the subsequent location of the St. George "upon this portion of the lode was absolutely null and void, "and respondent did not and could not acquire any rights "whatever by virtue of its location upon or its possession "of this portion of the lode. A party cannot locate a valid "claim to a mining claim or lode already located and le-"gally possessed by others."

To sustain this position the Court cites *Belk* vs. *Meagher*, (104 U. S., p. 279,) which holds—

"The right of location upon the mineral lands of the "United States is a privilege granted by Congress, but it "can only be exercised within the limits precribed by the "grant. Locations can only be made where the law allows "it to be done. Any attempt to go beyond that will be of "no avail. Hence a re-location on lands actually covered "at the time by another valid and subsisting location is "void, and this not only against the prior locator, but all "the world, because the law allows no such thing to be done. "* * * The right to possession comes only from a "valid location. Consequently, if there is no location, "there can be no possession under it. Location does not "necessarily follow from possession, but possession from "location."

The law and decisions cited aptly apply hereto, for it appear from the findings (Rec., 20, 21) that the Uncle Sam was properly located and legally held and possessed "as located" down to the trial of this cause.

II.

ADVERSE CLAIM OF ROSE ET AL.

The plaintiff in error asserts the insufficiency of this adverse claim, because it did not show the "boundaries and "extent" thereof as the law requires. The argument thereon below is exceedingly brief, and grounded solely on the fact that the plat attached thereto "shows a claim "only two hundred feet wide, covering the zone only "in part and in part extending at the northwesterly end "out upon the shale several hundred feet."

The office of an adverse claim is for executive information and guidance solely. It is addressed to the land officers, and remains upon their files. Upon such filing and seasonable commencement of suit all that is referred to the Court for hearing and decision is "the question of the "right of possession." Manifestly, the sufficiency of the adverse claim paper so filed is *not* a matter for judicial cognizance or review. As held by the Court below, (Rec., 53:) "This objection is one that should, if relied upon, have "been made in the Land Office when the protest was "filed."

No motion for dismissal on this ground was ever made before the Land Department, nor did such Department, *mero moto*, ever question its sufficiency in matters of form or substance. Its sufficiency must therefore be presumed.

"If the adverse claimants properly allege that they are "the owners of the claim, that is good pleading, and suffi-"cient to notify the applicant for patent of what is claimed."

Op. Ass't Att'y-Gen'l Smith, Sept. 30, 1873. Jenny Lind Co. *vs.* Eureka Co., Copp's U. S. Min. Lands, p. 129.

The adverse claim of Rose *et al.* averred (Rec., 30)—

"That the so-called St. George lode or vein, wherefor a "patent is applied, is identical with the Uncle Sam vein or "lode above described, and is not the property of the ap- "plicant for patent, but of these adverse claimants; that is "to say, within the end lines of the Uncle Sam claim, being "the easterly and westerly boundaries thereof, the nature "and extent of the conflict being more particularly set "forth in the diagram of the Deputy Mineral Surveyor "hereunto annexed, marked Exhibit 'F,' and made a part "hereof."

This was "good pleading," and all sufficient. It averred ownership of the lode applied for within described end lines. The mining law *gave* the right to all portions of the lode within vertical planes drawn through such end lines, and for the full width of the lode. It was not necessary to plead this as a *fact*, for the rule of pleading is that—

"It is not necessary to allege what the law will pre- "sume."

Stephen on Pleading, Tyler's ed., p. 318.

Nor "to state matter of law."

Ib., 312.

The Court below overruled this objection thus, (Rec., 53:)

"The respondent, in its application for a patent to the "St. George location and lode, claimed 215 feet in width "upon the surface. The Uncle Sam location claimed 200 "feet in width upon the surface.

"The protest avers 'that the so-called St. George lode or "'vein, wherefor a patent is applied, is identical with the "'Uncle Sam vein or lode,' and refers to the diagram to "show 'the nature and extent of the conflict.' The pro- "test, in its description of the 'nature, boundaries, and ex- "'tent' of the Uncle Sam location and lode, is as clear, "definite, and specific as was the application presented by

" respondent for a patent to the St. George. If the protest " is defective, so is the application. It would be absurd, in " the first instance, to decide that the application was suffi- " cient when it only claimed 215 feet in width on the sur- " face, and then, in the next breath, declare that the pro- " test was insufficient because it did not claim the entire " width of the lode on the surface. It is a conceded prop- " osition that there is but one lode within the limits of the " respective locations. It therefore necessarily follows, not- " withstanding the fact that each party only claimed 200 " feet in width on the surface, that whichever party has the " better right to the possession of the lode will be entitled " to its entire width and entire depth, although it may in its " downward course so far depart from a perpendicular as to " extend outside the vertical side lines of the surface loca- " tion."

III.

COMMENCEMENT OF ACTION.

It is urged that the Court erred in holding that the suit was commenced within the thirty days after filing of adverse claim, as the statute requires—

a. Because no docket fee was paid when complaint was filed.

b. Because no summons was issued.

The Court below overruled this objection, (Rec., 53,) holding (1) that by docketing the cause the clerk assumed payment of the fee, and in fact paid it, (Finding 15, Rec. 21;) and (2) upon authority of *Iowa M'g Co.* v. *Bonanza M'g Co.*, 16 Nev., 64, " the defendant, by demurring and " answering, waived the issuance of summons."

The question being one of State practice, arising under State laws in State tribunals, the decision of the Supreme Court of Nevada thereon is conclusive.

Bell *vs.* Morrison, 1 Pet., 351.

Beach *vs.* Viles *et al.*, 2 *Ib.*, 675.
U. S. *vs.* Morrison, 4 *Ib.*, 124.
Green *vs.* Neal's Lessee, 6 *Ib.*, 291.
Nesmith *vs.* Sheldon *et al.*, 7 How., 819.
Jefferson Bank *vs.* Skelly, 1 Bl'k, 436.
Sumner *et al. vs.* Hicks *et al.*, 2 *Ib.*, 599.
Peik *vs.* Railway Co., 94 U. S., 164.

It cannot become a Federal question, reviewable in this Court. The Federal mining law requires suit in support of an adverse claim to be commenced within a prescribed time. The complaint was undeniably filed within the thirty days. As matter of State law and practice the Court below holds the suit was seasonably commenced. The findings are silent as to whether any summons was issued or not. The defendant appeared and answered, "and did not at any time move "to dismiss the action or file a plea in abatement." "From "these facts (says the Court) it is apparent that it cannot "now be claimed that the action was not commenced in time."

The fact appears (Finding 15, Rec., p. 21,) that the fee was paid by the clerk in this case in the customary way.

The ruling of the Court that defendants' voluntary appearance waived the issue of summons is in accordance with the settled rule in analogous cases.

Harkness *vs.* Hyde, 98 U. S., 476.
Hulett *vs.* Nugent, 71 Mo., 131.
Proska *vs.* McCormick, 56 Iowa, 318.
Dyer *vs.* North, 44 Cala., 157.
Bury *vs.* Conklin, 23 Kans., 460.
People *vs.* Barnett, 91 Ill., 422.
Bowen *vs.* School District, 10 Neb., 265.
Adams Express Co. *vs.* Hill, 43 Ind., 157.
Field's Federal Practice, p. 177, sec. 204, and case cited.

"The acts of Congress do not attempt to confer any juris-
" diction not already possessed by the State Courts, nor to
" prescribe a different form of action. We are of opinion
" that when the action is brought it must be tried by the
" same rules, governed by the same principles, and controlled
" by the same statutes that apply to such actions in our State
" Courts, irrespective of the acts of Congress."

420 Mining Co. *vs.* Bullion M'g Co., 9 Nev., 240.

The objection that summons was not issued was not made in the trial Court, and hence no opportunity was afforded plaintiffs to prove the facts. There is no finding that summons was *not* issued. It must be presumed here, therefore, that summons did issue in proper time and manner, for the judgment will not be reversed unless the facts affirmatively found require it. It is too late to make the objection for the first time in the appellate Court.

Langabaugh vs. *Virginia & Truckee RR. Co.*, 9 Nev., 271.

The Code of Nevada (sec. 1085) makes the voluntary appearance of defendant equivalent to service of process and a waiver of summons. But it is strenuously insisted such appearance is effective only from its date, and in this case was *three* days after the thirty days limited for commencement of suit. On this ground it is contended that the adverse claim was thereby waived, and the Executive had thereafter power to proceed regardless of it.

Manifestly the appearance and filing of demurrer related to the date of the filing of complaint, October 21, 1873, which date was fully within the time. Such demurrer concedes prior pendency of the action, for same recites:

" And now comes the said defendant and demurs to the
" complaint of plaintiffs *on file in this action.*"

Rec., 2.

There is no finding that summons was *not* issued. The Court below expressly so state. The summons *may* have issued and never been returned, such return being made unnecessary by defendant's voluntary appearance. It is submitted this Court will not review the question when raised in the appellate tribunal after lapse of years without objection made in the trial court, and when all opportunity to prove a variety of facts excusing issue or record of summons was withheld by defendant's silence there upon the point.

The limitation of time in the Federal statute is in effect a statute of limitations. The rule as deduced from many cases relating to commencement of suits within the statute of limitations is this:

Where the plaintiff has, within the prescribed time, done whatever the statute required of him for the inception of his suit, such as filing in a proper Court a complaint or a *præcipe* for the proper process, his claim will be held not to be barred, even though the Clerk of the Court neglect to issue the process within the time or the sheriff to serve and return the same.

Kirby *vs.* Jackson, 42 Vt., 552.
Allen *vs.* Mann, 1 Chipp., (Vt.,) 94.
Johnson *vs.* Farwell, 7 Greenl., (Me.,) 370.
Jewett *vs.* Greene, 8 Greenl., (Me.,) 447.
So. Prop. Gos. *vs.* Whitcomb, 2 N. H., 227.
Blair *vs.* Cary, 9 Wis., 543.
Snyder *vs.* Ives, 42 Iowa, 157.

In *Bank of the U. S.* vs. *Lyles*, 10 Gill & Johnson, (N. Y.,) 326, it was held—

"The running of the act of limitations is arrested by the "docketing of an action with directions to the Clerk to issue "the necessary process, whether such process is issued or "not."

A further and conclusive answer is found in the mining statute itself. The language of the law is *not* that suit or action shall be brought within thirty days after filing of adverse claim. The direction is "*to commence proceedings*," (R. S., sec. 2326.)

What are "proceedings?"

"Proceeding, when spoken with reference to actions, "means any step taken by a party in the progress of an "action."

Abbot's Law Dictionary. Title Proceeding. Citing—
Wilson vs. *Allen*, 3 How., Pr. 369.
Williamson vs. *Champlin*, Clarke, 9.
Rich vs. *Husson*, 1 Duer, 617.

"Proceeding, in a statute providing for a dismissal of a "suit unless 'proceedings shall be had' within one year "from the entry of a certain order, applies to a service of "notice by the opposite attorney that he will move to va-"cate the judgment."

Bonesteel *vs.* Orvis, 31 Wis., 117.
Abbott's Law Dictionary. Title Proceeding.

"Proceedings. In practice. The steps or measures "taken in the course of an action including *all* that are "taken. The proceedings of a suit embrace *all* matters "that occur in its progress judicially."

Burrill's Law Dictionary. Title Proceedings, citing—
Gardner J., 2 Seldens, R. 319–320.

The term is defined by Webster thus:

"In law the course of steps or measures in the prosecu-"tion of actions is denominated *proceedings*."

There is manifest propriety in the use of the term "com-"mence proceedings," as found in the mining law. The

law was operative in many States and Territories, each having variant practice under codes or otherwise. In some—as in California—an action is commenced by filing of complaint. In others by filing of complaint and issue of summons. In still others, by filing of complaint, issue and service of summons. It would have been extremely oppressive to require *service* of summons as essential to the proper commencement of suit within the limited period fixed by the law.

The failure of the proper officer to issue or serve the writ, or the defendant's intentional evasion of process until expiration of the statutory period, would thus defeat a meritorious claimant by acts beyond his control. Yet such is the logical result of our opponent's argument.

We submit the statute means only that the adverse claimant shall begin the necessary steps within thirty days to secure judicial determination of the controversy. That was accomplished in this case by seasonable filing of complaint. There was no laches in this regard, and the State Court has held it sufficient. We submit that concludes the question.

IV.

EFFECT OF ADVERSE CLAIM AND SUIT THEREUNDER.

Conditioned upon proper filing of adverse claim showing "the nature, boundaries, and extent" thereof, and seasonable commencement of suit thereunder, the law (R. S., Sec. 2326) directs in mandatory terms that "*all proceedings* except the publication of notice and making and filing of affidavit thereof, *shall be stayed* until the controversy shall have been settled or decided by a Court of competent jurisdiction, or the adverse claim waived."

The term "all proceedings," which are thus "stayed"

refers to the proceedings pending before the Executive, which are initiated by an applicant for the acquisition of the legal title by purchase and patent from the Government. The inhibition is against further Executive action, and in legal result creates a *reservation* of the premises, and an express statutory direction that patent shall *not* issue to any one therefor until the right of possession, *inter partes*, has been judicially determined. The result of such judicial determination, evidenced by the judgment roll, is made by the law binding upon the Executive, upon whom is thereafter cast the mere ministerial duty of issuing patent to the successful party or parties "according to their respective "rights."

The procedure prescribed by the Federal mining law for the acquisition of the fee and the direct causes which led thereto, form an interesting chapter in the land legislation of the country and the public history of the times.

The decisions of this Court narrate with clearness the facts on which that public history is founded, and give the weight of judicial sanction to the wisdom and beneficence of existing Federal legislation which was framed to meet and protect the rights which had thus grown up under the local customs and laws.

Prior to 1866, the public mineral domain was occupied by thousands of adventurous seekers for gold. Whilst technically trespassers, years of occupation had created local laws, customs, and court decisions recognizing vested rights of possession against all persons except the sovereign. The implied license which arose from the silence of the Government, and the force of such possessory titles, was strengthened by the direct legislative recognition found in the act of February 27, 1865, (R. S., Sec. 910,) which provided—

"No possessory action between persons, in any Court of

" the United States, for the recovery of any mining title,
" or for damages to any such title, shall be affected by the
" fact that the paramount title to the land in which such
" mines lie is in the United States, *but each case shall be*
" *adjudged by the law of possession.*"

Thus before the policy of the Government for the disposal of the mineral domain became formulated into law, the Legislature had recognized " the law of possession " as the controlling basis for the adjudication of mining property rights. The decision of this Court in *Jennison* vs. *Kirk*, (98 U. S., 453,) which contains an apt epitome of the early mining history of the times, declares:

" The first appropriator was everywhere held to have,
" within certain well-defined limits, a better right than oth-
" ers to the claims taken up, and in all controversies, except
" as against the Government, he was regarded as the origi-
" nal owner, from whom title was to be traced."

When, by the act of 1866, the Government legalized the exploration and occupation of the public mineral domain, the local customs and rules of miners governing the possessory title were expressly recognized, so far as the same were not in conflict with the laws of the United States.

" In no provision of the act was any intention manifested
" to interfere with the possessory rights previously acquired,
" or which might be afterwards acquired. The intention
" expressed was to secure them by a patent from the Gov-
" ernment."

Jennison vs. *Kirk*, *supra*.

But these possessory rights were unknown to the Government. The record was scattered through hundreds of mining districts or titles rested in parol. To dispose of the fee by sale and patent, and at the same time protect the

rights of the "first appropriator," induced adoption of the system whereby, upon an application for patent and publication thereof in prescribed form, adverse claimants might appear and contest in the courts of the vicinage "the question of the right of possession." Such local courts, having control of persons and of records, familiar with the subject-matter, and of convenient access to rival claimants, afforded a cheap, ready, and satisfactory mode of determining in whom rested the prior right of possession, and whom the law designed to protect by patent.

420 M'g Co. *vs.* Bullion M'g Co., 4 Sawyer, 644.

Hence the proceeding by publication was a proceeding *in rem*, whereby the *status* of the thing was determined as against all the world. Publication without objection raised, in the language of the statute, (Sec. 2325,) the conclusive presumption "that the applicant is entitled to a patent, " * * and that no adverse claim exists."

But timely appearance of adverse claimants and seasonable commencement of prescribed suit operated as a stay of all further executive proceedings until the controversy was thus judicially determined or the adverse claim waived, and the judgment roll was made the conclusive basis of the successful litigant's right.

By this procedure the true party rightfully entitled to the possession was ascertained, and upon him the law bestowed the fee.

The simple process thus provided carried within itself, and by express provision, certain consequences and intermediate results.

(*a.*) Publication of notice without objection bound the world and fixed the status of the *thing*. In principle and result it is closely allied with the familiar procedure in ad-

miralty, and all other forms of action whereby property rights are determined as against unknown claimants.

Under the mining law jurisdiction to sell was conferred upon the land department. The party entitled to purchase was he who, by priority of possession, had acquired priority of right. He was unknown. An applicant appears averring under oath such priority, and seeking to purchase. The truth of his averment could only be ascertained by *some* mode of inquiry satisfactory to the Government, and affording reasonable opportunity to other unknown claimants, if such there were, to challenge the applicant's right. The tribunal having jurisdiction of the *thing* was empowered to determine its status by notice in prescribed form.

"The claimant is a party, whether he speaks or is silent, "whether he asserts his claim or abandons it."
Crondson *vs.* Leonard, 4 Cranch, 437.

"The object and purpose of a proceeding purely *in rem* "is to ascertain the right of every possible claimant; and it "is instituted on an allegation that the title of the former "owner, whoever he may be, has become divested, and no- "tice of the proceeding is given to the whole world to ap- "pear and make claim to it."
Woodruff *vs.* Taylor, 20 Vt., 73.
Wells on Res Adjudicata, Tit. Judgments in Rem, p. 503.
Hermann on Estoppel, p. 310.
Bigelow on Estoppel, p. 166.

"The publication is a summons to all persons to file ad- "verse claim."
Wolfley *vs.* Lebanon Co., 4 Colo., 117.

The proceeding under the mining law is analogous to that prescribed by the act of June 14, 1860, (12 Stats., 33,) for the survey of confirmed private land claims in California. By that act the Surveyor-General was required to publish

notice in prescribed time and manner that such survey had been made. Interested parties objecting thereto were required to take notice of the proceeding, and apply within a limited period to the District Court for its correction. If they failed to intervene the survey became final as to them. If no one objected, the survey became final by publication. If objected to, the Court determined the questions involved.

The survey thus made final by publication or by judgment of the Court was then transmitted to the Land Commissioner, upon whom the law cast the ministerial duty of issuing patent in accordance therewith.

In *Henshaw* vs. *Bissell* (18 Wall., 268) it was held—

"By the proceedings thus authorized the approval of the "survey brought before the Court had, as against claimants "under floating grants, the force and conclusiveness of a "judicial determination of a suit *in rem*, and all such "claimants were concluded by it.

"The survey of the claim under the Flugge grant was, "under the act in question, brought before the District "Court and there subjected to judicial examination, and "finally received the approval of the Court. If the defend-"ants or those under whom they hold failed to appear and "contest the survey they cannot now be heard in this action "to question its correctness."

See also Miller *et al. vs.* Dale *et al.*, 92 U. S., 476.
Adam *vs.* Norris, 103 *Ib.*, 593.
12 Opp. Att'y-Gen'l, 250.

If adverse claimants failed to respond to the citation their right was barred, and the Executive was directed to make title to the applicant on his making prescribed proofs and payment.

b. But adverse claimants appearing in prescribed manner, jurisdiction of the *res* was then transferred to the courts. Such transfer under the statute was complete. It left no

miralty, and all other forms of action whereby property rights are determined as against unknown claimants.

Under the mining law jurisdiction to sell was conferred upon the land department. The party entitled to purchase was he who, by priority of possession, had acquired priority of right. He was unknown. An applicant appears averring under oath such priority, and seeking to purchase. The truth of his averment could only be ascertained by *some* mode of inquiry satisfactory to the Government, and affording reasonable opportunity to other unknown claimants, if such there were, to challenge the applicant's right. The tribunal having jurisdiction of the *thing* was empowered to determine its status by notice in prescribed form.

"The claimant is a party, whether he speaks or is silent, "whether he asserts his claim or abandons it."

Crondson *vs.* Leonard, 4 Cranch, 437.

"The object and purpose of a proceeding purely *in rem* "is to ascertain the right of every possible claimant; and it "is instituted on an allegation that the title of the former "owner, whoever he may be, has become divested, and no- "tice of the proceeding is given to the whole world to ap- "pear and make claim to it."

Woodruff *vs.* Taylor, 20 Vt., 73.

Wells on Res Adjudicata, Tit. Judgments in Rem, p. 503.

Hermann on Estoppel, p. 310.

Bigelow on Estoppel, p. 166.

"The publication is a summons to all persons to file ad- "verse claim."

Wolfley *vs.* Lebanon Co., 4 Colo., 117.

The proceeding under the mining law is analogous to that prescribed by the act of June 14, 1860, (12 Stats., 33,) for the survey of confirmed private land claims in California. By that act the Surveyor-General was required to publish

notice in prescribed time and manner that such survey had been made. Interested parties objecting thereto were required to take notice of the proceeding, and apply within a limited period to the District Court for its correction. If they failed to intervene the survey became final as to them. If no one objected, the survey became final by publication. If objected to, the Court determined the questions involved.

The survey thus made final by publication or by judgment of the Court was then transmitted to the Land Commissioner, upon whom the law cast the ministerial duty of issuing patent in accordance therewith.

In *Henshaw* vs. *Bissell* (18 Wall., 268) it was held—

"By the proceedings thus authorized the approval of the "survey brought before the Court had, as against claimants "under floating grants, the force and conclusiveness of a "judicial determination of a suit *in rem*, and all such "claimants were concluded by it.

"The survey of the claim under the Flugge grant was, "under the act in question, brought before the District "Court and there subjected to judicial examination, and "finally received the approval of the Court. If the defend-"ants or those under whom they hold failed to appear and "contest the survey they cannot now be heard in this action "to question its correctness."

See also Miller *et al. vs.* Dale *et al.*, 92 U. S., 476.
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12 Opp. Att'y-Gen'l, 250.

If adverse claimants failed to respond to the citation their right was barred, and the Executive was directed to make title to the applicant on his making prescribed proofs and payment.

b. But adverse claimants appearing in prescribed manner, jurisdiction of the *res* was then transferred to the courts. Such transfer under the statute was complete. It left no

jurisdiction, concurrent or otherwise, with the Executive until final determination of the controversy in the courts or voluntary waiver of rights by the parties litigant.

When the transfer is thus effected the statute declares in emphatic terms that *all* Executive proceedings "shall be "stayed." In result it withdraws from Executive jurisdiction the entire subject-matter of controversy. Whilst the language is simple, its results are broad and comprehensive. A legislative *reservation* of the land is made as clear and certain as if the law itself embodied in terms a complete description of the boundaries of the land thus affected. Congress intended, and so declared, that the courts of competent jurisdiction, whose judicial powers were thus invoked, should determine the status of the thing itself, and who was entitled to purchase the fee. Lest its intention should be doubted, the supplemental act of March 3, 1881, (21 Stats., 505,) provides:

"That if in any action brought pursuant to section 2326 "of the Revised Statutes, title to the ground in controversy "shall not be established by either party, the jury shall so "find, and judgement shall be entered according to the ver- "dict. In such case costs shall not be allowed to either "party, and the claimant shall not proceed in the Land "Office, or be entitled to a patent for the ground in contro- "versy until he shall have perfected his title."

This unmistakably gives the Court power to adjudicate the status of the thing. Commenting thereon, the Supreme Court of Colorado has recently said:

"It is plain, therefore, that the object of the suit is for "the information of the officers of the General Govern- "ment, and that the proceeding must be conducted in ac- "cordance with the statute which authorizes it."

McGinnis *vs.* Egbert, West Coast Reporter, vol. 5, p. 323.

This being so, it follows necessarily that Executive action must be stayed until the required information has been judically ascertained.

The successive Secretaries of the Interior have consistently recognized the legislative intent herein outlined. Filing of adverse claim in proper form and suit thereunder has uniformly been declared an ouster of Executive jurisdiction, and further Executive proceedings stayed.

Secretary Chandler: City Rock *vs.* King of the West. Copp's Mineral Lands, p. 217.
Sacramento *vs.* Last Chance, *Ib.*, 221.

Secretary Schurz: Iowa Co. *vs.* Bonanza Co., *Ib.*, 260.

Secretary Kirkwood: Moffatt *vs.* Compromise Lode. Copp's Land-Owner, Vol. 8, p. 53.

Secretary Teller: Lincoln Mine. Department Land Decisions, Vol 2, p. 706.

In the latter case the adverse claim was dismissed by the Commissioner for defective execution; but, it appearing that suit had been commenced and was pending thereunder, the Secretary held "the question of its regularity and validity "should be left to the judgment of the Court, and that "pending the proceeding this Department should take no "action thereon."

The decisions cited illustrate the continued Executive practice. The reports abound with cases decided upon the same principle in the Department. Whilst the facts of each are varied, *all* reach the substantial result—that upon adverse claim duly filed and suit seasonably commenced the intention of the law is to transfer the whole controversy to the courts; and no technical rules of procedure should defeat that intention where a substantial controversy exists, over which the courts have thus secured jurisdiction.

c. Under the law the adverse claimant becomes an applicant for patent.

The statute makes the judgment-roll conclusive of the successful litigant's right. If the adverse claimant obtains such judgment he presents the record thereof to the Land Department, with proper survey of the premises awarded him thereunder, the certificate of the Surveyor-General that he has made the required expenditures, ($500,) and on payment of five dollars per acre for the superficies of his judgment claim, the law directs that "patent shall issue" accordingly.

This affirmative position, thus secured, is beyond the lawful power of the original applicant to injure or destroy. As the statute wisely requires such adverse claimant to commence judicial proceedings, whether in or out of possession, the adverse suit is within his control. The attempt has been made by original applicants to abandon the surface ground in controversy and obtain patent for the residue of the claim, and thus in effect secure the underlying lode, (the coveted prize in all cases.) But the rule was declared in Sacramento *vs.* Last Chance, *supra*—

"The possession of the surface ground in dispute may be "of the least importance, a mere incident; other and far "more important questions may be involved, the location "of the lode for example, and to allow the defendants to "obtain the advantage to be derived from the possession of "a patent from the Government simply by filing in your "office an abandonment of said surface ground, would, in "my opinion, be an invasion of both the intent and letter "of the law."

The manifest object of the law is to put in issue in prescribed form the rights of *all* persons in the *res* in question. Those who fail to appear are made parties by the publication, and their default is conclusive. Those who do

appear are made rival applicants, and the judgment-roll determines who among them is the successful applicant. The original applicant, whose appearance sets in motion the machinery of the law, stands on no higher plane than he who timely intervenes and asks by his adverse filing and suit to become the preferred applicant. The premises are open for sale. The original applicant asserts his exclusive right. The adverse claimant traverses that assertion and claims priority. The Government treats all parties thenceforward as applicants, and prescribes the mode for determining the preferred claimant. That mode is exclusive and conclusive. Exclusive of all other forms of procedure and conclusive of all individual rights. It holds the fee in abeyance until the appointed tribunal shall declare who is entitled, and to him "patent *shall* issue."

VI.

ST. GEORGE PATENT VOID.

The sole ground on which the Commissioner of the General Land Office assumed jurisdiction to issue this patent while the adverse suit of Rose *et al.* was pending and undetermined is disclosed by Finding 25, (Rec., 24,) viz.:

"That the said plaintiffs herein had not prosecuted this "action with due diligence to a final determination."

And rests on the provision of the mining law, (R. S., Sec. 2326,) viz:

"It shall be the duty of the adverse claimant, within "thirty days after filing his claim, to commence proceedings "in a Court of competent jurisdiction, to determine the "question of the right of possession, and prosecute the same "with reasonable diligence to final judgment; and a fail-"ure so to do, shall be a waiver of his adverse claim."

With whom does jurisdiction rest to determine the question of "reasonable diligence?" The Court below holds (Rec., 58)—

"When this suit was commenced the District Court ac-
"quired jurisdiction to try every question involved in the
"case, including the question of diligence in its prosecution."

The Court has jurisdiction of the parties and subject-matter—in a word, the cause. Manifestly *it* has power to dismiss for want of diligent prosecution. The rules of all judicial tribunals provide *some* mode for disposal of causes wherein parties litigant fail to prosecute or defend their rights within the time and manner required by the law of the forum. In other words, it cannot be denied that the District Court had jurisdiction to dismiss *this cause* for want of diligent prosecution. It was an action brought in the ordinary form, in the tribunal having jurisdiction of the *res*, and the parties litigant were bound "by the same rules, "governed by the same principles, and controlled by the "same statutes that apply to such actions in our State "Courts."

420 *M'g Co.* v. *Bullion M'g Co.*, 9 *Nev.* 240.

If, then, the Land Department has similar power to determine the question of diligent prosecution of the adverse suit, it can exercise at best only concurrent jurisdiction with the Court in this regard. On no ground can it be contended that such executive jurisdiction is *exclusive*. To so hold would deny the power of the Court to dispose of cases on its own docket, except by trial and judgment upon the merits.

If such concurrent jurisdiction exists in the Land Department, when does it cease? If it has power to determine that the suit has *not* been prosecuted with reasonable diligence, then, upon every principle of sound reasoning, it has

power to determine that it *has* been diligently prosecuted. If, then, the Court should dismiss the case for want of diligent prosecution, the Executive has power to review the question, and, if disagreeing with the Court, it has power to reverse its judgment and refuse to issue patent. The one is the necessary consequence of the other. There can be no jurisdiction, concurrent or otherwise, to determine a question but in one way. It would be equivalent to declaring that this Court has full power to affirm, but never to reverse, a judgment.

Tested by this simple rule, we submit the argument stands complete.

But the frame and policy of the mining law does not uphold such a contention. Tested by the surface reading of the statute and without study of the deeper meaning, which underlies it and forms its life, the conclusion cannot be reached that the question of diligence is left in any manner to Executive determination. In plain terms the adverse claimant is required, within a prescribed period, to commence proceedings in a court of competent jurisdiction to determine his rights, and pending determination of the controversy there all Executive action "shall be stayed." The judgment rendered by the Court is made the basis of renewed Executive jurisdiction, and patent follows the judgment-roll. But if in meantime the Executive has itself determined the controversy by holding that suit has not been diligently prosecuted, and issuing patent, of what effect is the judgment-roll, if it award "the right of possession" to the adverse claimant? Or what effect has such final judgment if the Executive has power to review the question of diligence? Such Executive jurisdiction continues until issue of patent, and upon this theory cannot be ousted by the judicial determination of the controversy.

To so construe the law is to make it contradictory on its

face. The "failure" which gives the Department power to declare waiver of the adverse claim arises upon the adverse claimant's omission to bring suit as the statute requires. To hold beyond that limit is to create confusion and contradiction of terms.

But the spirit of the law means, and can only mean, that the Court having jurisdiction of the controversy may find upon the question of diligence, and dismissal of the case therein creates a waiver of the adverse claim. That construction agrees with the settled rules of judicial procedure and practice, which it cannot be assumed this law intended to violate or disturb. This jurisdiction "to hear and determine" must be exclusive of any other, or the law is a pitfall and snare.

"Where a Court has jurisdiction, it has a right to decide "every question which occurs in the cause."
Elliott vs. *Piersol*, 1 *Pet.*, 340.

And the mining statute did not invade this right, and should not be so construed.

An assumed jurisdiction in the Department to determine this question would not only create confusion, but result in direct wrong. The inquiry, however fairly conducted, could not always elicit the truth, for the Executive machinery does not afford any proper mode of ascertaining such facts. The Department has no power, summary or otherwise, to compel attendance of witnesses or production of records. The ultimate facts on which the assumed delay and consequent waiver is founded may arise from faults or delay inherent in the Court having jurisdiction of the cause. Did the law *intend* to vest such power in the Executive to determine such a vital question upon *chance* testimony, and by possibility reflecting on the Court, State or Federal, wherein the suit is pending? We submit it did not.

The facts of this case fairly illustrate our argument.

The District Court held in terms (Rec., 15) "that in due "time plaintiffs protested and filed an adverse claim against "said application; that they brought suit in the proper Court "within the required time, *and have prosecuted said action* "*with due diligence under the circumstances proven on the* "*trial.*"

The formal findings affirm this conclusion, (Findings 22–25, Rec., 23,) and show that trial was delayed by pending negotiations for compromise, *inter partes*, and that defendant moved for continuance therein. No motion to dismiss the case on any ground was ever made, and the defendant by affirmative acts, and by silent acquiescence, permitted the case to thereafter continue untried without objection.

Whilst standing thus in Court, however, and in Sept., 1876, it produced to the Land Department the certificate of the Clerk thereof "that this action had not been placed "upon the calendar, nor had any proceedings been had "therein from the March term, 1874, to the date of the "said certificate." Upon this certificate, the Register and Receiver held entry should be allowed, because the suit had not been diligently prosecuted. Without notice to the adverse claimants of the proceeding, (as the findings expressly state,) those officers transmitted the papers to the Commissioner, who again, without notice to the adverse claimants and without further inquiry in any form *why* the case had not been tried, affirmed the action of the local officers. Then, and for the first time, Rose *et al.* were advised of the proceeding and the Commissioner's action, and allowed sixty days for appeal therefrom to the Secretary of Interior. They did not so appeal, and patent issued.

Upon these conceded facts we submit the inquiry: Did Congress intend to give opportunity for such injustice as

these facts disclose? The Clerk's certificate was true upon its face, but as held by the Court below, (Rec., 59)—

"This fact, without showing the cause of the delay, con-
" veyed to the officers of the Land Department an abso-
" lutely false impression, and induced them, in an *ex-parte*
" proceeding, to decide that the plaintiffs had not prose-
" cuted the suit with reasonable diligence; *whereas the truth*
" *was, as established at the trial, that defendant was respon-*
" *sible for the delay in the prosecution of the suit.*"

We may properly add the further criticism that *if* the Executive had jurisdiction to determine the fact the law never contemplated its ascertainment by an "*ex-parte proceeding.*"

The Secretary of Interior has broadly ruled that the question of diligence is *not* a matter of Executive cognizance, but for the Court alone to determine, and that all questions affecting the merits of the controversy are transferred there.

In *Iowa Mg. Co.* vs. *Bonanza Mg. Co.*, (Copp's Mineral Lands, p. 260,) Secretary Schurz held—

" I am of opinion that the proper practice in cases of this
" character is for the defendant, if in his opinion the suit
" is not prosecuted with reasonable diligence, to move the
" Court to dismiss the case for want of prosecution, and if
" the motion is granted, cause the judgment to be certified
" to your office, when a patent can be issued without con-
" flict with the jurisdiction of the Courts or the rights of
" the parties in interest."

To same effect is the decision of Secretary Chandler in *City Rock* vs. *King of the West*, (Copp's Mineral Lands, p. 219.)

As the Commissioner had no jurisdiction in this case to determine this question of diligence, the refusal of Rose *et*

al. to recognize his action or appeal therefrom cannot affect their rights.

But the plaintiff in error invokes the doctrine that a correct judgment will not be disturbed because founded on erroneous reasoning, and contends that as the Uncle Sam location was invalid, the adverse claim insufficient, and suit not properly commenced, the Commissioner's judgment was correct, if his expressed reasoning was faulty. There is no room for such contention. The Land Department had no power to adjudge the Uncle Sam location invalid; the defects in the adverse claim (if existing) affected the merits of the controversy, which was transferred to the court by an action which that tribunal holds was commenced in time. In short, there was no weakness in our title; no resulting waiver from our acts, and no jurisdiction in the Commissioner to declare otherwise. The *fact* of our pending adverse claim and suit *reserved* the land in controversy. Until determination of that controversy the Land Department had no more authority to convey this land by patent to any one than it could lawfully exercise over lands situate in a foreign country. The *reservation* existing, patent could not issue, and the attempt to so issue a paper styled a patent was in result a mere nullity. The present judgment of this Court upon this adverse suit against us would not cure the want of power then existing, and could not validate an act which, when done, was done without authority and in direct violation of law. In effect, the argument is that *if* it be now judicially determined that we have no rights, such judgment would relate back to the date of the patent and validate the instrument. We submit an adverse judgment could have no such *ante-mortem* effect or galvanize with life an act which the statute declares shall *not* be done until final judgment upon the controversy, and done then only in accordance with the judgment-roll.

In this respect the mining law stands alone. In all other cases, and under all other laws for disposal of the public domain, the land department has continuing jurisdiction over the subject-matter and the parties until, by conveyance in proper form, the title of the Government has passed. If it has acted wrongfully and by mistake of law passed the title to A when it should have so passed the title to B, the Courts will hold A trustee of the legal title for B, and compel conveyance. This is the doctrine of Johnson *vs.* Towsley, (13 Wall.), and a long line of similar decisions.

But, under the mining law, the instant adverse claim is filed and suit seasonably commenced, the executive jurisdiction ceases, and never again attaches until the suit is determined or the adverse claim waived. The controversy and the *res* is lifted from Executive jurisdiction and transferred elsewhere. And on final determination of the controversy upon its merits by the appointed tribunal the record of that determination becomes the sole mandatory basis for renewed Executive jurisdiction and issue of patent in accordance therewith. It is not within the contemplation of the law that meanwhile the Executive may proceed and undertake to pass the title. *Per contra* its express language and direction is that title shall *not* pass. The act of 1881, *supra*, declares that if neither party, applicant or adverse claimant, prove title, judgment shall be rendered against both. Suppose then in this case the judgment be that neither party is entitled, of what avail is the patent which has issued? Does the judgment-roll follow the patent or the patent the judgment-roll? And suppose in such a case the patent be produced by the applicant, the defendant in the suit, must the Court treat it as valid and conclusive, and base its judgment upon such an instrument, requiring no proof beyond? Can it do so and obey the law? And if it righfully refuse to give the patent such conclusive effect, and the assumed

patentee fail to prove his right of possession, must not the Court give judgment accordingly, notwithstanding the patent? And can it so decide without necessarily holding the patent absolutely void?

We submit these inquiries can be answered but in one way. This suit was pending and untried when the act of 1881 was passed, and must be controlled thereby. The mining law of 1872 intended no such result as here obtains. It never contemplated issue of patent while the adverse suit was properly pending and undetermined. It created a reservation in apt and certain terms, by necessary and complete intendment, and its letter and spirit are both defeated by any assertion of legal right based on an instrument issued while the proceeding is *in fieri* to determine whether such patent shall issue to either party, and if so, whom. To hold otherwise would nullify the law. The judgment-roll, which the law declares shall be the basis of subsequent patent, could have no more force than a piece of blank paper. In fact, there could be no judgment rendered upon the question of the right of possession, because the Executive had usurped the functions of the Court and issued patent on its own judgment-roll.

VII.

VICTORIA PATENT VOID.

The foregoing argument against validity of the St. George patent is fully applicable here.

The plaintiff in error contends this patent rightfully issued because Rose *et al.*, by failure to adverse its application therefor, waived all right to that portion of the lode here in controversy. *Non constat.*

If the Victoria patent covers that portion of the lode here in controversy, then *ex necessitate* it issued without au-

thority, and at a time when such portion of the lode was by law reserved from sale pending determination of this adverse suit.

Either this result must follow or the mining law is fatally defective.

The finding is, that all of these locations are upon the same lode. The law gives the earliest locator *all* the lode within the extended planes of his respective end lines. An application for patent asks a grant of the fee to the same extent. An adverse claim makes the same demand as to that portion of the lode thus put in contest. The suit is brought to determine in whom rests the prior right. If, then, the statute has any meaning, it creates a reservation from sale of that portion of the lode thus put in contest. Otherwise the result would be that a third party might, *sub judice*, present an application for the same premises, and if not adversed, both by the prior applicant and adverse claimant, secure patent, and by consequence the legal title! This result is not changed because the prior applicant under one name seeks to purchase the lode and joins issue in Court with the adverse claimant to determine the respective right, and under another name seeks to secure the *same premises* by a subsequent application whereon he secures patent. To permit him then to plead such patent as conclusive against the adverse claimant is to impute to the law a result never intended.

It must be borne in mind that in *this* proceeding the plaintiff in error is not asserting a right to purchase the Victoria claim. Its application is for the St. George mine and *all* that portion of the lode embraced by the respective end lines of that claim. Our adverse claim and suit asserts a prior right of purchase to all that portion of the lode so applied for and embraced within the extended planes of the end lines of the Uncle Sam location, in so far as that loca-

tion properly covers the same lode, viz., between the lines A C and K L. Each party is in Court to "determine the "question of the right of possession" to that portion of the lode thus put in controversy. The applicant is claiming by virtue of the St. George location, for had no adverse claim intervened it is obvious patent would have issued to the applicant under that location as the basis of title *and that alone.*

The publication of the St. George application accomplished two results:

1. It concluded the rights of all persons who failed to appear in response thereto.

2. The adverse claim and suit of Rose *et al.* disclosed existence of controversy between the applicant and adverse claimants, and all other persons being barred by the publication, the law required judicial ascertainment of the rights thus set up *inter partes.* It involved determination of the status of the thing, and as between the sole existing claimants thereto, viz., the applicant and adverse claimants. The result of that controversy carried the right to the entire lode between the lines of conflicting ownership. The reservation was necessarily as broad as the issue before the Court. Otherwise the Court could not determine the "right of pos-"session," as the statute required.

Therefore we repeat that the statute created a reservation from sale of so much of the entire lode and throughout its entire surface width as was involved in the conflicting claims of ownership arising upon the adverse claim and suit thereunder. If not, what effect has the law, and what can the adverse suit determine? If the stay of Executive proceedings does not reach this result, then it is a useless and vain procedure. If an application duly adversed does put in issue the right of possession to a described portion of the lode, (which must be conceded,) how can the same portion

of the same lode be open to application and purchase by any one, pending the proceedings in Court brought to determine the right of possession. The object of the publication is to develop all conflicting claims. If repeated applications may be made for the same portion of the same lode, a party who has failed to adverse may present a subsequent application, and, if unobjected to, procure patent, vesting in him the complete title. On such a theory the original applicant, and all persons duly appearing in opposition thereto, would be concluded unless they again appeared adversing the second applicant, and brought suit in manner prescribed. And if the theory be sound, the proceedings could be indefinitely multiplied. Any number of applications may be presented, and any number of suits commenced affecting the same *res*.

And upon the same theory the original applicant could, on filing of adverse claim, dismiss his application and commence *de novo*, continuing the process without limit, until exhausting the purse and patience of his adversary.

To such contention there can be but one answer. The law can only be construed to mean that *one* application, and *one* adverse claim, followed by *one* proceeding in court, puts in issue the right to purchase all that portion of the lode thus adversely claimed, and pending the determination of that controversy, all the premises covered thereby are withdrawn from sale to any one; otherwise the proceeding is a farce, and the judgment-roll, which the law declares shall be conclusive of the right to patent, would have no effect.

The law having provided in apt terms one form of procedure, all others are prohibited. The procedure is exclusive and single. When a controversy is properly developed thereunder, the process cannot be repeated, but the judgment in that controversy determines the right.

The Land Department so construe the law. An applica-

tion for mineral patent is held to withdraw the premises applied for from market until such application is finally disposed of.

Virginia *vs.* Crown Point, Copp's Mineral Lands, p. 163.
Chavanne Mine, *Ib.*, 305.
Rebellion Mg. Co., Land Decisions, vol. 1, p. 554.
F. P. Harrison, *Ib.*, vol. 2, p. 769.
Great Eastern *vs.* Esmeralda, *Ib.*, p. 704.

As to that portion of the lode here in contest between the lines A C and K L, there is no surface conflict with the Victoria claim on the one hand and the St. George and Uncle Sam on the other, yet all are admittedly located on the surface of the same great lode. Now the uniform rule of the Land Department is that an adverse claim will not be recognized in the absence of surface conflict, although the allegation be that both claims are upon the same lode. The reason of the rule is elaborately stated in—

Chollar Potosi *vs.* Julia, Copp's Mineral Lands, p. 97.
Smuggler *vs.* Seventy-Eight, *Ib.*, p. 284.

The former decision was rendered February 24, 1873; the latter, February 28, 1880.

Hence Rose *et al.* having no surface conflict with the Victoria claim within the limits of the controversy here, could not have filed an adverse claim which the Land Department would have recognized as sufficient to stay proceedings. As the law does not require a vain thing, their failure to do what was beforehand known to be ineffectual cannot operate to their injury here.

But the surface lines of the Victoria claim carries a few feet of the northeastern end of the Uncle Sam location, and because of this insignificant conflict it is urged with great earnestness that same could have been made a basis of

adverse claim, and failure to adverse carries a resultant waiver of all right to that portion of the lode here in contest.

But the surface conflict lies east of the line A C, and upon that portion of the lode covered by the Tip Top patented claim owned by this plaintiff in error. We are not claiming that portion of the Uncle Sam location. The judgment below was against us for that portion of our claim, and we do not question its correctness nor ask its reversal. Had we adversed the Victoria, our suit thereunder would have terminated against us for that piece of surface ground because of the prior patented Tip Top claim. Assuredly our silence can work no greater results. And even upon the theory that such adverse claim would have involved the entire lode within the end lines of the conflicting locations, any suit brought thereunder would necessarily have been terminated by the plea that the same parties were in Court, upon the same cause of action, involving the same lode, under the prior St. George application. Such plea would have defeated us *in that action.*

This being so, our failure to adverse the Victoria carried no greater consequences than would have resulted upon adverse suit being necessarily determined against us upon one or both of foregoing grounds.

But even upon this view we are not concluded. The fact being that all of these locations are upon the same lode, it appears from the diagrams that the eastern end line of the Uncle Sam falls within the St. George claim. Assume the existence of a controversy here beyond the line A C and up to the eastern end line of the Uncle Sam as unaffected by the prior Tip Top patent, (which is the exact measure of the controversy as tested by the pleadings,) manifestly the controversy involved *all* of the Uncle Sam claim at that end. If judgment was rendered for Rose *et al.* for all the ground

thus in controversy, their right would be established to *all* the lode lying within and west of the extended planes of the eastern end line of the Uncle Sam. That would result independent of the Victoria claim and patent.

Now in pleading the Victoria patent here it is obvious the plaintiff in error cannot claim any greater rights thereunder than could an entire stranger who happened to own under the Victoria patent.

If, then, the Victoria patent had been procured by a stranger who now held the title, could the plaintiff in error plead in this case our failure to adverse the Victoria application as conclusive of our right against it under its St. George application? Assuredly not. How, then, can its ownership of the Victoria strengthen its title as against us in *this* proceeding? Equally with us it is seeking judgment whereon to base its right to the St. George patent as applied for. Does it strengthen its position to prove that the premises in suit have in fact been conveyed under the Victoria patent? Such a contention necessarily nullifies its entire proceeding under the St. George application. It is based solely on the ground that it has the title under the Victoria patent, and hence there is nothing to litigate here under its prior St. George application.

If it is an independent claim, wherein patent was secured in an independent proceeding, and assuming the proceeding was authorized and the patent legal, what is the claimed result?

If the Victoria application was made by a stranger—there being no surface conflict with the St. George—the claimants of the latter were not required or permitted to file adverse claim, and no waiver of right resulted. If existing or subsequent developments proved both claims to be upon the same lode, priority of location would govern.

But the insignificant conflict of the Victoria at the ex-

treme eastern end of the Uncle Sam location required Rose *et al.* to file adverse claim, and failure to so file creates a waiver of right not alone as to this insignificant piece of surface ground, but as to the entire lode covered by the end lines of the Uncle Sam claim.

And this notwithstanding the prior St. George application and adverse claim of Rose *et al.* had put in controversy *all* the lode extending to the easterly end line of the Uncle Sam, and judgment therein for the adverse claimant up to the easterly end line would carry the right to a patent for all that portion of the lode.

We submit all that could have been put in issue by adverse claim and suit against the Victoria was already in issue by the proceedings under the prior St. George application. And having been done once, the law did not permit or require it to be done again. Instead, therefore, of an existing conflict with the Victoria, which the law required Rose *et al.* to protect by adverse claim proceedings, the ultimate fact is that Rose *et al.* were in Court with the same parties, testing the same question, in the only lawful contest which could be initiated And further, that as they are not claiming *here* any portion of the lode covered by the assumed surface conflict with the Victoria, their failure to so file is conclusive against them only as to the portion of the lode thus voluntarily relinquished—that portion lying east of the line A C.

The decision of the Circuit Court in Eureka Co. *vs.* Richmond Co., (4 Sawyer, 302,) was rendered August 22, 1877, and for the first time authoritatively determined that "the "limestone zone on Ruby Hill, in Eureka District, lying "between the quartzite and the shale, constitutes, within "the meaning of the acts of Congress, one lode of rock "bearing metal."

This conclusion was reached after exhaustive examination of the subject, and is founded on a *résume* of the facts and

law both masterly and convincing. Its correctness has never been gainsayed. In the trial of this case, as the decision of the trial court recites, (Rec., 12,) it was throughout admitted on all sides that all of the locations of the contending parties "were a part of and upon the same great vein;" and such is the express finding.

As the Richmond Company was an actor in the former case wherein this fact was established, it had, therefore, full and peculiar knowledge of the fact, and of all its resulting consequences under the law. In other words, it knew that its pending St. George application, if ripened into patent by successful termination of this adverse suit or purchase of the adverse right, would carry *all* the lode within the end lines of that location. More than that, before the decision in the Eureka case, and on May 7, 1877, it had obtained issuance of the St. George patent.

If that patent *rightfully* issued it carried all the lode within its end lines and for its entire width. But the adverse suit was pending and undetermined when that patent issued. The shadow of coming events, and the possibility of finding that patent of no avail in this case whenever a fair trial upon the merits occurred, rendered it of vital importance that some new basis of title should be created.

Accordingly, on Oct. 18th, 1878,—more than one year after the decision in the Eureka case—it presented an application for the Victoria claim, covering the identical portion of the lode here in controversy. No adverse claimant appearing, patent was secured thereon February 28, 1880. That patent is presented here as conclusive of our rights, and its validity vehemently maintained.

Should it be so treated?

Remembering that the Victoria location is subsequent in time to the Uncle Sam, (Finding 19, Rec., 22,) is it possible to give conclusive effect to an instrument obtained under

such circumstances? That it purports to cover the same lode does not admit of doubt. That it purports to convey the right to the same subject-matter covered by the St. George and the adverse claim and pending suit of Rose *et al.* is equally clear. But it is also true that the same applicant, knowing all the facts and the legal consequences of those facts, was *then* asserting a right to the same premises under another location and in a prior proceeding. Did Congress intend by its legislation to afford it opportunity to defeat that proceeding by a new and dual application, and on our failure to respond thereto raise thereby an impassable barrier against our concluding the very proceeding which we had so commenced under the same law? To so hold would be against all principles of justice, and, we submit, against the law. The very fact that the Victoria patent is plead as conclusive here carries its own condemnation. If this lode was reservod from sale under the St. George application by our adverse claim and suit, how is it possible to affirm that the same premises were open to purchase by the plaintiff under a new and different proceeding? It is a contradiction in terms to so declare.

If it be contended that because the Victoria patent covers different surface ground (which is a mere incident of the grant) it is a valid instrument, then we maintain it is ineffectual here. If different surface ground gives it validity, then it stands only as a patent for the surface ground. And as no part of the surface which it embraces is involved in this suit, it cannot be considered here. It certainly does not carry both surface ground and lode for one purpose, viz., to defeat our rights, and surface ground only for another purpose, viz., as making it a valid instrument. It cannot cover us and not cover us. If it was rightfully issued, it can be only for the reason that it did *not* embrace any portion of the lode here in controversy; for, if it does, then it was

issued without authority and at a time when the lode was reserved from sale, and is therefore void.

We repeat, therefore, that the Victoria patent is either ineffectual against us or is wholly void against us. If ineffectual then we are entitled to judgment irrespective of it, and any underground conflict between the respective owners must be hereafter determined by the respective dates of location, to which dates the patents relate.

Eureka *vs.* Richmond, *supra.*

But if in fact purporting to convey the same premises covered by our adverse claim and pending suit it must be held null and void. Otherwise, the law which we invoked in good faith for our protection has become the engine of our destruction.

VIII.

THE ST. GEORGE AND VICTORIA PATENTS MAY BE DECLARED VOID IN THIS FORM OF ACTION.

The plaintiff in error contends that these patents are conclusive in this proceeding. That if issued wrongfully they are voidable only, and cannot be reached except in a direct chancery proceeding, brought for the express purpose of obtaining a decree of annulment.

This position is vigorously maintained. The decisions of this Court are invoked to uphold it.

If this contention be sound; if the decisions of this Court, rightly construed, reach this result in this case, then a great wrong has been done us, resulting in a substantial denial of justice. We should then be driven to a new proceeding in a Court of Equity to reach these patents. At the threshold we would be met with the plea that the judgment rendered against us in this action was, under the mining law, conclusive upon our rights and an absolute bar. That ob-

jection, if overcome, would leave us with all the presumptions of law in favor of the patents, and the burden of establishing prior legal right and paramount equities. We should be compelled to ask decree holding the patentee as trustee of the legal title for our benefit and for conveyance thereof, thus taking title not under our location and from its date by a clean instrument, but under another and different location of subsequent date. Or if decree were entered declaring the patents void, the legal title would then be put back in the United States, and subject only to our acquisition upon due application, published in prescribed form, and in response to which third parties could intervene as new adverse claimants, and thus continue an annoying and expensive litigation.

All this to accomplish what the law declared should be ascertained in the very action now before the Court, viz., " the right of possession."

Or if, as in duty bound, the United States should initiate the proceeding in its own name, it would only do so upon our being able to convince the Attorney-General that we were entitled to the relief sought. We should then obtain as an act of grace what the law in express terms promised us as a matter of absolute right. Such suit would be at all times within the control of the law officer of the Government, and subject to his continuing pleasure.

98 U. S., p. 70.

That we can properly be remitted to any such procedure we earnestly deny.

It must be remembered that we stand in direct privity with the source of legal title. That our location was prior in time, and became by the acts of 1866 and 1872, as construed by this Court, property in the highest sense of the term.

Forbes *vs.* Gracey, 94 U. S., 762.
Belk *vs.* Meagher, 104 U. S., 283.

By the law we were granted the exclusive right of possession of all the surface ground within our location, and all veins, lodes, or ledges having their top or apex therein and bounded by the end lines of the claim. The grant of the fee carries no higher rights of enjoyment in the property than does a possessory title founded on proper location, and maintained by requisite expenditure.

When by subsequent location and application thereunder the plaintiff in error sought to obtain the legal title to our prejudice, we promptly intervened with an adverse claim, the sufficiency of which has never been challenged by the Executive with whom it was filed. We seasonably commenced suit, which has never been dismissed either for insufficiency of form or substance or for lack of diligent prosecution. These things being done in proper form and timely manner, are declared by the law to create a reservation of the premises from sale, and we are directed to proceed under a statute which in terms promises us, in event of successful maintenance of our prior right of possession, that patent shall issue to *us* covering the premises in dispute.

Whilst pursuing the course appointed by the law, an officer whose jurisdiction is vacated thereby wrongfully issues a paper in form, signed, sealed, and recorded, whereby a purported conveyance of the premises is made to our opponents. That paper, styled a patent, is introduced in evidence, under our objection, at the trial of the case so brought to determine which of the contending parties (if either) is entitled to receive the conveyance of the Government! And its mere introduction is conclusive of the question of the right of possession. No inquiry behind it to ascertain how the alleged patentee obtained the fruits of victory be-

fore the battle was commenced. The jury, or the Court sitting in its place, must take the instrument as unassailable and conclusive in an action which, under the express command of the law, (act of 1881, *supra*,) requires each party to prove his right, or judgment to be rendered against both. Ignoring all this, the Court must promptly render judgment in accordance with the patent.

There is no decision of this Court which upholds such a doctrine. *Per contra*, its utterances are all the other way.

Assume this to be an action at law simply, and what is the result?

The clear, broad line of distinction running through the cases may be readily stated.

1. Where jurisdiction exists, but is mistakenly exercised, the patent is voidable only.

2. But where jurisdiction over the subject-matter did not exist the instrument is void, and is so treated, even in an action at law.

Thus where a tract of agricultural land is subject to sale, and two or more parties are claiming the right thereto, The Land Department has jurisdiction of the *res*. Its decision, evidenced by the patent, may be a mistaken exercise of power. Patent may have issued to one party when it should, under a proper construction of the law, have issued to the other.

In such a case a Court of Equity will declare a trust for the benefit of the party rightfully entitled.

Johnson *vs.* Towsley, 13 Wall.

Marquez *vs.* Frisbie, 101 U. S.

Or the Land Department may, in adjusting a grant of lands for railroad or other purposes, determine that the grantee is entitled to receive lands in excess of what the law, properly construed, would give. Many cases of this kind

have occurred, and upon suit by the United States to recover this Court has been called upon to declare its judgment. But as the lands were in fact public and subject to Executive disposal the instrument or conveyance is voidable only.

But where jurisdiction over the subject-matter is entirely wanting the attempted conveyance is a mere nullity, and so uniformly treated. This is precisely our case. If the mining statute means anything, it declares in terms a reservation of land covered by pending adverse claim and suit.

Thus in *Polk's Lessee* vs. *Wendell*, 9 Cranch, this Court said:

"There are cases in which a grant is absolutely void; as "where the State has no title to the thing granted *or where* "*the officer had no authority to issue the grant. In such* "*cases the validity of the grant is necessarily examinable at* "*law.*"

In *Patterson* vs. *Winn*, (11 Wheaton,) it was held—

"We may therefore assume as the settled doctrine of this "Court that if a patent is absolutely void upon its face *or* "*the issuing thereof was without authority, or was prohib-* "*ited by statute*, or if the State had no title, it could be "impeached collaterally in a Court of law in an action of "ejectment."

In *Stoddard* vs. *Chambers*, (2 How, 284,) it was held—

"On the above facts the important question arises whether "the defendant's title is not void. * * * No title can "be held valid which has been acquired against law, and "such is the character of the defendant's title, so far as it "trenches on the plaintiffs. It has been argued that the "first patent appropriates the land and extinguishes all "prior claims of inferior dignity. But this view is not "sustainable. The issuance of a patent is a ministerial act, "which must be performed according to law. It is true

" a patent possesses the highest verity. It cannot be con-
" tradicted or explained by parol; but if it has been fraud-
" ulently issued or issued against law it is void. It would
" be a most dangerous principle to hold, that a patent should
" carry the legal title, though obtained fraudulently or
" against law. Fraud vitiates all transactions. It makes
" void a judgment, which is a much more solemn act than
" the issuing of a patent. The patent of the defendant
" having been for land reserved from such appropriation is
" void, and also the survey of Coontz so far as either con-
" flicts with the plaintiff's title."

In *Minter et al.* vs. *Crommelin* (18 How., 87) it was held—

" But if the Executive has no authority to issue the pat-
" ent, because the land was not subject to entry and grant,
" then it is void, and the want of power may be proved
" by a defendant at law."

In *Easton* vs. *Salisbury*, (21 How., 426,) certain land was reserved to satisfy pending unconfirmed Spanish grants. Whilst so reserved a New Madrid warrant was located thereon. The Court held—

" There was no period from the entry and patent of the
" New Madrid claim in which that claim was valid. The
" location was not only voidable, but it was absolutely void,
" as it was made on land subject to a prior right."

In *Best* vs. *Polk*, (18 Wall, 112,) it was held—

" It has been repeatedly held by this Court that a patent
" is void which attempts to convey lands that have been pre-
" viously granted, reserved from sale, or otherwise appro-
" priated."

The doctrine was reaffirmed in *Morton* vs. *Nebraska*, (21 Wall., 660,) the Court adding—

"The executive officers had no authority to issue a patent "for the lands in controversy, because they were not sub- "ject to entry, having been previously reserved, and this "want of power may be proved by a defendant in an action "at law."

Sherman vs. *Buick*, (92 U. S., 209,) was an action at law. Defendant relied upon a patent issued by the State of California as part of a school section. Testimony was offered to show that the State never had any title to the land. This Court held—

"The effect of the evidence was to show that the title set "up by defendant under the State was void. Not merely "voidable, but void *ab initio*. * * * It has always "been held that an absolute want of power to issue a patent "could be shown in a court of law to defeat a title set up "under it."

It is true that in *U. S.* vs. *Hughes*, (4 Wall., 236,) it was held that whether a patent be void or voidable, "it, "*prima facie*, passed the title." But that is the result in every case. The limitation of the inquiry in an action at law is, had the Executive authority, and was the land subject to grant? The result of such inquiry determines whether the instrument is void or only voidable. If it did not, *prima facie*, pass the title, it would require no consideration whatever as a conveyance.

In *U. S.* vs. *Stone*, (2 Wall., 525,) it was held—

"A patent is the highest evidence of title, and is conclu- "sive as against the Government, and all claiming under "junior patents or titles until it is set aside or annulled by "by some judicial tribunal."

But the Court immediately adds—

"The patent is but evidence of a grant, and the officer

" who issues it acts ministerially and not judicially. *If he* " *issues a patent for land reserved from sale by law, such* " *patent is void for want of authority.*"

So in *Moore* vs. *Robbins*, (96 U. S., 530,) which holds that issue of patent exhausts Executive jurisdiction, the Court is careful to declare that—

" *We are speaking now of a case in which the officers of* " *the Department have acted within the scope of their au-* " *thority.*"

And in *Marquez* vs. *Frisbie* (101 U. S.) the same qualification is expressed in like terms.

In *Smelting Co.* vs. *Kemp*, (104 U. S., 636,) this entire subject is presented with great clearness and ability. The decisions of the Court are carefully reviewed and the doctrine reaffirmed thus:

" If the patent, according to the doctrine, be absolutely " void on its face it may be collaterally impeached in " a court of law. It is seldom, however, that the recitals " of a patent will nullify its granting clause, as, for in- " stance, that the land which it purports to convey is re- " served from sale. Of course, should such inconsistency " appear, the grant would fail. Something more, however, " than an apparent contradiction in its terms is meant when " we speak of a patent being void on its face. It is meant " that the patent is seen to be invalid, *either when read in* " *the light of existing law or by reason of what the Court* " must take judicial notice of; as, for instance, that the " land is *reserved by statute from sale*, or otherwise appro- " priated, or that the patent is for an unauthorized amount, " or is executed by officers who are not intrusted by law " with the power to issue grants of portions of the public " domain. So also, according to the doctrine in the cases " cited, if the patent be issued *without authority* it may be " collaterally impeached in a court of law." * * *

" A patent in a Court of law is conclusive as to all mat-

" ters properly determinable by the Land Department, *when* " *its action is within the scope of its authority; that is,* " *when it had jurisdiction under the law to convey the* " *land.* * * *

" On the other hand, a patent may be collaterally impeached " *in any action, and its operation as a conveyance defeated,* " by showing that the Department had no jurisdiction to " dispose of the lands; that is, that the law did not provide " for selling them, or that they had been reserved from sale " or dedicated to special purposes, or had been previously " transferred to others. In establishing any of these par- " ticulars the judgment of the Department upon matters " properly before it is not assailed, nor is the regularity of " its proceedings called into question; *but its authority to* " *act at all is denied*, and shown never to have existed."

This decision fills the full measure of our contention.

When upon the trial of this adverse suit these patents were introduced in evidence, it was the absolute duty of the Court to look beyond the face of them. Why? Because they purported to convey the same premises there in controversy. The Court was bound to take judicial notice of the law, (R. S., sec. 2326,) which declared in terms that upon filing of adverse claim and suit the Executive should proceed no further until the controversy was judicially determined or the adverse claim waived. No express waiver was proven or could be presumed, because the adverse claimants were present prosecuting the action. Finding these purported patents, then, to have been issued at a time when the Executive had no " authority to act at all," no " jurisdic- " tion under the law to convey the land," and the land reserved by express command of law, how could the Court do otherwise than declare, as it did, that the patents were void? Void for the reasons repeated *in extenso* in foregoing decisions of this Court. Void because the subject-matter was not within Executive jurisdiction. Void because the ap-

pointed tribunal at the time of their attempted issue was determining which of the contending parties was entitled, if either, to receive the very conveyance which the alleged patentee had produced. If there be a case wherein the doctrine of this Court, as expressed above, is applicable, we confidently submit this is one.

The infirmity and the conclusion affects both patents, for the Victoria is equally void, if in effect covering that portion of the lode here in controversy, or ineffectual to disturb our rights if plead as establishing the title of plaintiff in error. In either event and in any view it cannot be admitted as a basis of judgment against us, for either the surface ground or lode in controversy here.

The precise point was determined in *McGarrahan* vs. *Mining Co.*, 49 Cala., 333. That was an action of ejectment. The plaintiff plead a patent issued upon a private land claim—the Panoche Grande. The Court held:

"The claim to the rancho 'Panoche Grande' was not "finally confirmed, therefore, when the alleged patent was "issued, and the same is void."

But were the patents voidable only; had the Land Department jurisdiction of the *res* at the time they were issued, this Court may in this form of action declare a trust thereunder in favor of defendants in error.

Under the Civil Code of Nevada, law and equity are blended, there being but one form of action; and relief is granted by judgment or decree, according as the right is legal or equitable in its nature.

The pertinent provisions of the Practice Act are as follows:

"Section 1. There shall be in this State but one form of "civil action for the enforcement or protection of private "rights and the redress or prevention of private wrongs.

"Sec. 37. All the forms of pleading in civil actions, and "the rules by which the sufficiency of the pleadings shall "be determined, shall be those prescribed in this act.

"Sec. 38. The only pleadings on the part of the plaintiff "shall be the complaint or demurrer to defendant's answer, "and the only pleadings on the part of the defendants shall "be the demurrer or answer.

"Sec. 65. The allegations of new matter in the answer "shall on the trial be deemed controverted by the adverse "party.

"Sec. 150. The relief granted to the plaintiff, if there be "no answer, shall not exceed that which he shall have de- "manded in his complaint, but in any other case the Court "may grant him any relief consistent with the case made "by the complaint and embraced within the issue."

Compiled Laws of Nevada, ed. 1873, pp. 272, 286, 299, 324.

And section 1674 (p. 452) of the same Code under which this action was directly brought provides:

"In all actions brought to determine the right of posses- "sion of a mining claim or metaliferous vein or lode, where "an application has been made to the proper officers of the "Government of the United States by either of the parties "to such action for a patent for said mining claim, vein, or "lode, it shall only be necessary to confer jurisdiction on "the Court to try said action, and render a proper judgment "therein, that it appear that application for a patent for "such mining claim, vein, or lode has been made, and that "the parties to said action are claiming such mining claim, "vein, or lode, or some part thereof, or the right of posses- "sion thereof."

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And the blended effect of the State practice is seen in present case, where judgment and order of injunction are both entered.

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And the Nevada Supreme Court, in denying the prayer of Rose *et al.* for decree declaring a trust and compelling conveyance, did not question its power so to do as matter of practice in this action. It held solely that as the patents were void no trust could be created thereon.

And we submit the Court correctly ruled, for it cannot be doubted that the mining statute of 1872 gives us the *right* to a judgment whereon we may obtain a clean instrument unaffected by any outstanding patents which were issued without authority, and are therefore ineffectual.

It is strenuously insisted by opposing counsel that defendants' amended answer contained no new matter which, under the cited provisions of the Code, could be covered by an implied replication. It is urged that new matter is such only as constitutes a plea in confession and avoidance. We submit this is error.

The action is to determine the right of possession, and founded on conflicting possessory claims. The defendant's original answer, filed long before issue of St. George or Victoria patents, is necessarily based on *that* degree of title. Its supplemental answer in terms declares a new title and a a new defence, for it avers " that since the commencement " of said action defendant has acquired *title by patents* from " the United States to all that portion of said mining ground " in controversy."

Rec., 4.

We submit this was a plea of new matter, analogous to a new assignment in plea of freehold, and within the cited provision of the Code. It became part of the issue upon the trial, and, under sec. 150 (*supra*) of the Code, became also part of the case made by the pleadings under which the Court was empowered to grant full relief.

IX.

STATUTE OF LIMITATIONS.

This plea is unavailing.

It was not urged as matter of defence below, and the Court did not pass upon it in any manner. The authorities are uniform that it cannot be considered here.

"The record shows that this ground of defence was not "brought to the consideration of the Circuit Court; we do "not, therefore, feel ourselves at liberty to express any "opinion upon the question."

Bell vs. *Bruen*, 1 How., 187.

"The other questions presented by the assignment of "errors and argued here cannot be considered, as the record "does not show that they were brought to the attention of "either of the Courts below."

Walker vs. *Sauvinet*, 92 U. S., 90.

Bartemeyer vs. *Iowa*, 18 Wall., 129.

And the rule is mutual against review of questions not presented by plaintiff below.

Hamilton Co. vs. *Massachusetts*, 6 Wall., 632.

The plea is without merit.

The findings distinctly show that the defendants in error have had actual possession of the Uncle Sam claim as located up to the time of trial. The findings are as explicit our way as they are the other. The possession of plaintiff in error has been underground and hidden. Ours upon the lode and surface as well and visible.

The act of 1872 guaranteed us the exclusive surface possession within the limits of our location.

R. S., sec. 2322.

"But when the claim is defined and the party enters in "pursuance of mining rules and customs, the possession of "part is the possession of the entire claim."

Atwood vs. *Fricot*, 17 Cala., 43.

"Where the boundaries of claims overlap, each claimant "working within his admitted lines, the possession of neither "extends constructively to the interfering ground in such "manner as to create an adverse possession."

Maine Co. vs. *Boston Co.*, 37 Cala., 41.

The statute is not plead in bar, nor does the original or amended answer state facts sufficient to bring the case within its operation. It cannot, therefore, be considered.

Field vs. *Columbet*, 4 Sawyer, 529.

Norton vs. *Meader*, *Ib.*, 615.

We submit the judgment below should be affirmed.

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A. B. BROWNE,
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